

LIBRARY

COURT, U. S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH, PETITIONER,

VS.

**WINFRED OVERHOLSER, SUPERINTENDENT,
ST. ELIZABETHS HOSPITAL**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR HABEAS CORPUS FILED APRIL 17, 1961

(HABEAS CORPUS GRANTED JUNE 19, 1961)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH, PETITIONER,

vs.

WINFRED OVERHOLSER, SUPERINTENDENT,
ST. ELIZABETHS HOSPITAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the District of Columbia Circuit	a	1
Joint appendix consisting of portions of record from the United States District Court for the District of Columbia	a	1
Docket entries	1	2
Petition for writ of habeas corpus	2	3
Pauper affidavit of Frederick C. Lynch and order thereon	6	6
Return and answer	7	7
Exhibit "A"—Commitment papers	9	9
Supplemental return and answer	10	10
Excerpts from transcript of proceedings, June 16, 1960	12	12
Statement by counsel for petitioner	12	12
Colloquy	15	14
Statement by counsel for respondent	15	15
Order	20	19
Municipal Court information No. U.S. 7736-59	22	21
Attachments—Letters from James A. Ryan, Assistant Chief Psychiatrist, D. C. General Hospital to Criminal Clerk's Office, Municipal Court, dated December 4, 1959 and December 28, 1959	24	23

Joint appendix consisting of portions of record from the
United States District Court for the District of Colum-
bia—Continued

	Original	Print
Municipal Court information No. U.S. 7737-59	26	25
Stipulation as to supplemental record, dated July 8, 1960	28	27
Notice of appeal	29	28
Opinion, Bastian, J.	30	29
Dissenting opinion, Fahy, J.	40	38
Judgment	48	45
Clerk's certificate (omitted in printing)	51	
Order granting motion for leave to proceed in forma pau- peris and granting petition for writ of certiorari	52	46

[fol. a]

[File endorsement omitted]

**IN UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

No. 13859

**WINFRED OVERHOLSER, SUPERINTENDENT, ST. ELIZABETHS
HOSPITAL, Appellant,**

v.

FREDERICK C. LYNCH, Appellee

**Appeal from the United States District Court for the
District of Columbia**

JOINT APPENDIX—Filed August 9, 1960

[fol. 1] **IN UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA**

Habeas Corpus 130-60

FREDERICK C. LYNCH,

v.

WINFRED OVERHOLSER

James Mitchell Jones, 1507 M St., N.W.

**Lawrence Spencer, American Civil Liberties Union,
1612 Eye St., N.W.; Richard Arnes, Headquarters Bldg.,
Dupont Circle.**

**Date
1960**

Docket Entries

**Jun 13—Petition for writ of habeas corpus & affidavit of
poverty filed. Without prepayment of costs.**

**Jun 13—Order authorizing filing and for writ to issue
returnable June 16, 1960 at 10:00 a.m. Tamm, J.**

Jun 13—Writ and copy issued: served: 6-13-60.

**Jun 16—Return and answer to petition of habeas corpus
c/s 6-16-60, exhibit "A" App. Oscar Altschuler.**

**Jun 16—Supplemental return and answer to writ of
habeas corpus.**

**Jun 20—Transcript of Proceedings; Edna B. Romig,
Reporter, June 16, 1960 Pgs. 1-16.**

**June 27—Order that the writ of habeas corpus shall
issue and the petitioner restored to liberty unless within
10 days civil proceedings for commitment of petitioner
shall be institute' (N) McGarraghy, J. Micro 6-28-60.**

**July 1—Notice of Appeal of deft. copies mailed to
Richard Arens, James M. Jones & Lawrence Speiser.**

**July 1—Request for stay of effectiveness of Court's
Order of June 27th, 1960, pending disposition of case by
U. S. Court of Appeals denied (fiat) (N) McGarraghy, J.**

**July 6—Order that Clerk transmit original record and
transcript of proceedings to Court of Appeals forthwith
McGuire, J.**

[fol. 2] [File endorsement omitted]

**IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA**

Habeas Corpus No. 130-60

In the matter of FREDERICK C. LYNCH

Address of Petitioner:
St. Elizabeths Hospital
Washington, D. C.

PETITION FOR WRIT OF HABEAS CORPUS—Filed June 13, 1960

Comes now the Petitioner, Frederick C. Lynch, by his counsel, and represents to the Court as follows:

I

Petitioner, Frederick C. Lynch, is confined, detained and restrained of his liberty by one Winfred D. Overholser, Superintendent of St. Elizabeths Hospital.

II

The pretended cause for such confinement is a judgment of acquittal by reason of insanity followed by an order of commitment to St. Elizabeths Hospital, entered by the Municipal Court for the District of Columbia in criminal proceeding No. U. S. 7736-59 on December 29, 1959, purportedly pursuant to authority furnished by Section 301 of Title 24 of the D. C. Code.

III

The confinement of Petitioner is illegal and the illegality thereof consists in this:

A. The Petitioner was acquitted by reason of insanity notwithstanding the fact that he had been medically and judicially recognized as competent to stand trial and had sought to enter a plea of guilty to the charge of uttering a check with intent to defraud, then pending against him.

4

The refusal of the Court to accept the plea of guilty under the circumstances of the herein case deprived the Petitioner of his liberty without due process of law, since the acquittal by reason of insanity resulted and is resulting in his confinement for an indefinite and prolonged period [fol. 3] and perhaps for life whereas a judgment of guilty on the charge of the instant case, to wit, uttering a check with intent to defraud, with Petitioner having no prior record, would have resulted in probation or a fine.

B. Moreover, under the facts outlined, an impossible burden was cast upon Petitioner in the rebuttal of the psychiatric evidence. For in this context, loss of liberty was not conditioned upon the establishment of the insanity of the Petitioner by proof beyond reasonable doubt, or by a fair preponderance of evidence or by substantial evidence or under any other standard cognizable in judicial or administrative proceedings, but was conditioned instead upon the casting of the slightest doubt, provided that it be called reasonable, upon the Petitioner's sanity. The jeopardy of human liberty upon the basis of a standard fit for Caesar's wife blatantly defies every axiom of democratic justice. See *In re William M. Bryant*, 3 Mackey 489, 14 D. C. 489 (1885); *Barry v. Hall*, 68 App. D. C. 350, 98 F. 2d 22 (1938); *Tatum v. United States*, 88 U. S. App. D. C. 386, 190 F. 2d 612 (1951).

C. Commitment to a mental hospital under the circumstances outlined also violates the safeguards of the civil commitment law embodied in Title 21, D. C. Code, Section 306 et seq. Thus, if this commitment be permitted to stand, the mere establishment of a reasonable doubt of mental health could result in the instant confinement in a mental hospital, without benefit of jury, Mental Health Commission or District Court proceeding, including jury trial, of any citizen facing the Municipal Court upon the basis of a parking ticket. The Court of Appeals has expressed itself in unambiguous terms upon this issue in *Williams v. Overholser*, 259 F. 2d 175 (D. C. Cir. 1958).

D. Even if the judicial initiative in the presentation of the evidence of Petitioner's insanity be condoned, the auto-

matic commitment of Petitioner without evidence and a judicial finding of *present* dangerousness must be deemed a loss of liberty without due process of law. *In re William M. Bryant, supra; Barry v. Hall, supra.*

[fol. 4] E. Petitioner has been deprived of his liberty without due process of law in that Section 301 of Title 24 of the D. C. Code is unconstitutional on its face and as construed and applied in the instant case in violating the due process clause of the Fifth Amendment to the United States Constitution in that

1. Section 301(d), properly construed, applies only to defendants who affirmatively raise the insanity defense.

2. Section 301 of Title 24 of the D. C. Code fails to provide that a judicial finding must be made upon competent and substantial evidence that a defendant is at the time of trial (and not just at the time of the act charged) mentally ill and socially dangerous requiring immediate commitment to a mental hospital or in the alternative, requiring an immediate report back to the Court with a full hearing within a few days after an automatic commitment for a judicial finding of present social dangerousness requiring further treatment and deprivation of liberty in a mental institution.

WHEREFORE, Petitioner prays:

- (1) That a writ of habeas corpus be granted and issued, directed to the said Winfred D. Overholser, commanding him to produce the body of Petitioner before a judge of this Court at a time and place therein to be specified, then and there to receive and do what shall be ordered herein in that behalf.

- (2) That Petitioner be restored to his liberty.

- (3) For a declaration that Section 301 of Title 24 of the D. C. Code is unconstitutional and void.

- (4) For such and further relief as to the Court may seem just and proper.

Frederick C. Lynch, Petitioner.

Subscribed and sworn to before me this 3rd day of June 1960 Morgan J. Trexler, Notary Public D.C.

My Commission Expires May 31, 1963.

Attorneys for Petitioner:

1. Lawrence Speiser, by R.A. c/o American Civil Liberties Union, 1612 I St., N.W.
 2. Richard Arens, Headquarters Bldg., at Dupont Circle, Washington 6, D.C.
 3. James Mitchell Jones, by R.A. 1507 M Street, N.W., Washington, D.C.
- (Appointed by Municipal Court)

[fol. 5] Let this Writ issue, returnable the 16th day of June, 1960, at 10:00 AM, dated June 10, 1960.

Edward A. Tamm, Judge.

[fol. 6] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

Habeas Corpus No. 130-60

FREDERICK C. LYNCH,

vs.

WINFRED D. OVERHOLZER

PAUPER AFFIDAVIT AND ORDER—Filed June 13, 1960

AFFIDAVIT OF FREDERICK C. LYNCH

I, the above-named affiant, being duly sworn according to law depose and say that I am the petitioner in the above-entitled proceeding; that I am a citizen of the United States; that I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the nature of my action is briefly stated as follows:

I was committed to St. Elizabeth's Hospital by the Municipal Court on the basis of an acquittal by reason of

insanity notwithstanding the fact that I was held judicially competent and sought to enter a guilty plea.

Frederick C. Lynch.

Sworn to and subscribed before me this 3rd day of June 1960.

Morgan J. Trexler, Notary Public D.C.

My Commission Expires May 31, 1963.

ORDER OF COURT

It is Ordered that the petitioner in the above-entitled proceeding be and he hereby is permitted to prosecute said proceeding to conclusion without prepayment of fees or costs or security thereof.

Edward A. Tamm, District Judge.

Dated: June 10, 1960.

[fol. 7]

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

Habeas Corpus No. 130-60

In re FREDERICK C. LYNCH, Petitioner

RETURN AND ANSWER TO PETITION OF HABEAS CORPUS—
Filed June 16, 1960.

The return and answer on behalf of Dr. Winfred Overholser, Superintendent, Saint Elizabeths Hospital, respectfully represents to the Court:

The petitioner, Frederick C. Lynch, in his petition for writ of habeas corpus alleges that he is illegally detained at Saint Elizabeths Hospital, Washington, D.C., by the Superintendent of Saint Elizabeths Hospital. The respondent admits that the petitioner is confined in Saint Elizabeths Hospital but denies that such detention is illegal or unlawful.

The petitioner, Frederick C. Lynch, was admitted to Saint Elizabeths Hospital on December 29, 1959, by order of the Municipal Court for the District of Columbia, pursuant to the provisions of Title 24, Section 301(d), of the District of Columbia Code, as amended, after having been found not guilty by reason of insanity on charges of Passing Bad Checks, Criminal Numbers U.S. 7736-59 and 7737-59.

Certified copies of his commitment papers are attached hereto, marked Exhibit "A", and prayed to be read as part of this return.

The petitioner, Frederick C. Lynch, has failed to allege that the respondent is acting arbitrarily and capriciously in failing to certify him for release.

The petitioner, Frederick C. Lynch, does not allege that he is of sound mind.

During this petitioner's period of confinement in Saint Elizabeths Hospital, he has been under the care and observation of the respondent, as well as other members of the medical staff of Saint Elizabeths Hospital, skilled in the care, diagnosis and treatment of nervous and mental disorders, who are of the opinion that he has not recovered from his abnormal mental condition, to wit: Manic-Depressive Reaction, Manic Type, and the respondent is [fol. 8] therefore unable to certify that the petitioner will not be dangerous to himself or others within the reasonable future, by reason of his mental disorder.

WHEREFORE, the premises considered, the respondent prays that the writ herein be discharged, the petition dismissed, and the petitioner remanded to the custody of the respondent.

Winfred Overholser, M.D., Superintendent, Saint Elizabeths Hospital

Duly sworn to by Winfred Overholser, jurat omitted in printing.

Copy handed to Pet. in Court 16th day of June, 1960.

Oscar Altshuler.

[fol. 9]. Filed June 16, 1960. Harry M. Hull, Clerk

"EXHIBIT A" TO RETURN AND ANSWER

**IN THE MUNICIPAL COURT FOR THE DISTRICT OF COLUMBIA,
CRIMINAL DIVISION**

Case No. US 7736.7-'59

**CITY OF WASHINGTON,
District of Columbia,**

To the Superintendent of St. Elizabeth's Hospital:

Receive into your custody the body of Frederick C. Lynch, herewith sent by the Municipal Court, brought before said Court charged upon the oath of A. P. Ennis. The Court having found the accused not guilty on the ground that he was insane at the time of the commission of the offense, the Court orders the accused committed to St. Elizabeth's Hospital, pursuant to Public Law 313—84th Congress, Chapter 673, 1st Session.

Further Ordered that the defendant be committed to the District of Columbia General Hospital until such time as the proper facilities are available at St. Elizabeth's Hospital.

Therefore safely keep in your custody until—he shall be discharged by due course of law; and for so doing this shall be your sufficient order.

Witness, The Honorable John Lewis Smith, Jr., Chief Judge of The Municipal Court for the District of Columbia, and the seal of said Court this 29th day of December, A.D. 1959.

Walter F. Bramhall, Clerk, The Municipal Court,
D.C. By Joseph S. M. Burton, Deputy Clerk.

Precinct No. —

Subscribed and sworn to before me this 15th day of June, 1960.

William F. Edwards, Notary Public, D. C.

Certified a true copy: P. M. Lehman, Registrar, Saint Elizabeths Hospital, Washington 20, D. C.

[fol. 10] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Habeas Corpus No. 130-60

FREDERICK C. LYNCH,

v.

DR. WINFRED OVERHOLSER

SUPPLEMENTAL RETURN AND ANSWER—*filed June 16, 1960*

Comes now the respondent, Dr. Winfred Overholser, by his attorney, the United States Attorney for the District of Columbia, and makes the following return and answer to the writ issued in this cause.

1. Petitioner, Frederick C. Lynch was committed to St. Elizabeths Hospital December 29, 1959, by order of the Municipal Court for the District of Columbia after having been found not guilty by reason of insanity in Criminal Cases Nos. U.S. 7736-59 and 7737-59, pursuant to 24 D. C. Code, Section 301, as amended.

2. On June 13, 1960, a petition for a writ of habeas corpus, prepared by counsel for petitioner, was permitted by the Court to be filed in forma pauperis.

3. Petitioner alleges that his commitment is invalid for lack of due process, and that Section 301, Title 24, D. C. Code, as amended, is unconstitutional.

4. The contention that petitioner was entitled to a separate judicial hearing to determine whether he was insane at the time of trial is essentially one which was rejected by our Court of Appeals in regard to 24 D.C. Code, Section 301 before it was amended in 1955 by making commitment mandatory instead of discretionary after a verdict of not guilty by reason of insanity. *Orencia v. Overholser*, 82 U. S. App. D.C. 285, 163 F.2d 763 (1947). It should also be noted that before enacting the 1955 amendment, Congress had before it a Report of the Committee on Mental Disorder as a Criminal Defense, Council of Law Enforce-

ment of the District of Columbia which outlined the commitment procedures of all jurisdictions of the United States and observed that "In 10 states and in England the Court [fol. 11] is required to forthwith commit the person (found not guilty by reason of insanity) to a mental hospital."

5. There is no allegation by petitioner that the evidence does not support a verdict of not guilty by reason of insanity as of the time of the commission of the crime. And this presumption of insanity continues until otherwise rebutted as required by law. *Barry v. White*, 62 App. D.C. 69, 64 F.2d 707 (1933); *Orencia v. Overholser*, *supra*; *People v. Lamb*, 118 N.Y. Supp. 389 (1909), cited by our Court of Appeals with approval in *Barry v. White*, *supra*. Following such a verdict a defendant must be committed to a mental hospital under the mandate of Congress as expressed in 24 D.C. Code, Section 301, as amended. During the five years of the statute, the numerous commitments in the District Court, and the opinions of the Court of Appeals, including many habeas corpus cases alleging illegal detention at Saint Elizabeth's Hospital, are all strong indications that our Court of Appeals upholds the validity of the mandatory commitment procedure as well as the statute.

6. It should also be observed that petitioner does not claim that he is not presently suffering from an abnormal mental condition and that if released that he would not be dangerous to himself or others in the reasonably foreseeable future; nor does he allege that the superintendent of the hospital is arbitrary or capricious in failing to certify his release in accordance with the statute.

Wherefore, it is respectfully submitted that the petitioner is lawfully detained in the custody of the respondent, that his petition should be dismissed and the writ be discharged.

(s) Oliver Gasch, United States Attorney. (s) Edward P. Troxell, Principal Assistant United States Attorney. (s) Oscar Altschuler, Assistant United States Attorney.

[fol. 12] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIA

Habeas Corpus No. 130-60

FREDERICK C. LYNCH, Petitioner,

v.

WINFRED D. OVERHOLSER, Respondent

Washington, D.C.,
Thursday, June 16, 1960

Transcript of proceedings

STATEMENT BY COUNSEL FOR PETITIONER

Mr. Arens. Essentially, if Your Honor please, the issue before the Court, and I shall proceed to the statement of facts as briefly as possible hereafter, is whether an individual defendant who has been medically and judicially recognized as competent when charged with crime can have an insanity defense foisted upon him against his will by action of the Court or the Government.

The facts of this are extremely simple and illustrate the basic issue to which I propose to address myself at this time. The petitioner had been charged in the Municipal Court, the lowest court of the city, with a misdemeanor, specifically, uttering a check with intent to defraud. Apparently he had made out a check with his own name on it. There was no question of forgery and he had no funds and apparently no reason to believe that he had funds to make it good.

[fol. 13] And so he came to the Municipal Court and apparently, upon prima facie evidence of some mental unsoundness being presented, he was transferred to the District of Columbia General Hospital for observation. Thereafter he was brought back to the Municipal Court and attempted to offer a guilty plea. The report from the D.C. General Hospital, if Your Honor please, was that he was mentally competent to stand trial. His guilty plea was not accepted by Chief Judge Lynch in view of the fact, the medical report—

The Court. Chief Judge who?

Mr. ARENS. I beg your pardon. Chief Judge Smith, Your Honor. In view of the fact the medical report had also asserted that the defendant was suffering from a mental illness and that his crime, which he admitted, was a product thereof.

Some evidence was heard, at either the behest of the Government or that of the Chief Judge of the Municipal Court. A psychiatrist specifically testified, and I believe there will be no dispute upon that subject, upon the part of the Government, although I was not present and I recall to this Court upon the basis of information and belief, a psychiatrist was called to testify and his testimony repeated the substance of his medical report. This man was mentally competent to stand trial; however, he was suffering from a mental illness and his crime, which incidentally is admitted, was the product of the mental disease in this case. All of this evidence, if Your Honor please, was produced over objection of petitioner's counsel, who is not in court at this time.

Chief Judge of the Municipal Court found the defendant not guilty by reason of insanity and committed him, pursuant to Section 301, Title 24 of the D.C. Code, on December 29, 1959. And the petitioner's allegation respectfully submitted to this Court is that this commitment is illegal and that a defendant, who is mentally competent to stand trial, has a right to interpose a guilty plea and to be sentenced upon that basis, and that if the Government wishes to secure his commitment to a mental hospital the proper procedure is through civil commitment proceedings provided for under Title 21 of the D.C. Code, because the results in this particular case are simple. They are plain for all [fol. 14] of us to see. The defendant, who otherwise would have gotten probation or a fine in view of what had previously been a spotless record, may now spend the rest of his life in a mental hospital, and that upon adjudication which was extremely cursory when compared to those available to him under the civil commitment law.

Of course the decision in *Durham*, as Your Honor knows, has facilitated the acquittal of defendants by reason of insanity. This defendant in effect was called upon to defend himself not upon the charge of uttering a check with

intent to defraud, he was called upon to defend himself against the charge of insanity. And this insanity, if Your Honor please, did not have to be proved beyond a reasonable doubt. It did not have to be proved by substantial evidence. It sufficed, under the Durham rule as interpreted by the United States Court of Appeals, that there was some reasonable doubt of insanity, to order this particular person committed. And I respectfully submit that neither Congress nor the Court of Appeals has visualized the situation whereby an insanity defense can be foisted upon an individual who does not want it, and who is judicially recognized as competent to stand trial for the consequences, would be far-reaching, tragic, and bizarre. Because if this man is permitted to remain at St. Elizabeths Hospital on the basis of this adjudication, and we raise no question at present as to his mental health, then any citizen of the United States—and may I say, Your Honor, in passing, in certain respects the majority of us are law-breakers; we all accumulate traffic tickets for the most part, although of course I cannot speak for everybody in court. I myself have received a traffic ticket on one occasion and have paid for it. On the basis of this particular charge, for example, a man can be brought into Municipal Court and psychiatrists can be gotten to testify that his failure to secure adequate and legal parking space was the result of some nervous unbalance. And may I respectfully call Your Honor's attention to the fact that the Court of Appeals has said we no longer have to prove insanity in the old sense of the word; it suffices if there is the slightest mental disorder which produces the crime to secure the acquittal of the defendant by reason of insanity.

.

[fol. 15]

COLLOQUY

The COURT. Let me ask you a question. I read your petition originally as constituting an attack on the constitutionality of 301, which requires mandatory commitment to—

Mr. ARENA. That is included in the petition. It is an alternate ground which I in no way withdraw and I shall be very glad to argue that particular ground if Your Honor wishes me to do so.

The Court. Frankly, on that ground I would rule against you. I think the procedures set up in 301 are constitutional and I think they have been sustained by the Court of Appeals in a number of cases.

I am concerned about your other point, however. That is the point of a man who had been found competent to stand trial, and wanted to enter a plea of guilty, were not permitted to do so, and then stood trial, as I understand your contention, and was found not guilty by reason of insanity and was then committed to St. Elizabeths in such a proceeding rather than proceedings established for the purpose of determining whether or not he was presently of unsound mind. Is that your point?

Mr. Arens. That is the principal contention of petitioner.

There is an alternate point, which I gather Your Honor has already ruled on.

The Court. Yes. I will rule on the other one against you. But I am very much impressed by the first point you made.

I will hear from the Government.

STATEMENT BY COUNSEL FOR RESPONDENT

Mr. Altshuler. I have here, Your Honor may be interested in reading, the report of the psychiatrist who testified in the case as counsel stated.

The Court. My sole problem is this: In a criminal case, in the Municipal Court, can that be turned into a case to determine the mental capacity of the defendant? When he doesn't raise the question? We have procedures for that purpose. We have a Mental Health Commission, for civil commitment. Can this man be committed in a criminal case where he has been found competent to stand trial and where he wants to enter a plea of guilty to the offense? [fol. 16] Can that be converted into a case to determine the mental capacity of this defendant? Have you got any cases on that?

Mr. Altshuler. No. I don't think there is any case on it either way. I don't think the point specifically has been presented to the Court of Appeals.

The Court. Do you know if it has been presented in this court?

Mr. Altshuler. I think by indirection, or analogy, I think,

that there are situations which show that it is considered proper.

For instance, first of all, the *Durham* decision was meant to cover those persons charged with crime who have a defense against criminal responsibility. In other words, being punished as criminals for those crimes.

Now, as Your Honor is well acquainted, in the *Tatum* case, it is a case where the Court decided that the evidence presented on the question of insanity was not sufficient to charge the jury to that effect. In that case the Court of Appeals pointed out to the Court that—

The Court. But in all of those cases the question of the defendant's mental competency was properly before the Court. Is the question of his mental competency, or was it, properly before the Court in this case where he offered to enter a plea of guilty?

Mr. Altshuler. Yes, because of this: if a man has a valid defense, the Court said in the *Rucker* case which came down on May 26—it was slightly different because again the defendant made one statement, I think in there, that he was insane when he committed the crime. But his attorney got up and argued to the jury after the judge charged the jury—I am sorry. The attorney argued to the jury that they were not utilizing the defense of insanity, that this man was guilty of the crime, but not of murder but of manslaughter. The judge then proceeded to charge the jury on the question of insanity. The Court of Appeals reversed that decision. They said counsel had no right to forego that defense of insanity.

Now in this case you have a similar situation to this extent—

[fol. 17] The Court. In that case you refer to, the defendant himself said "I must have been crazy at the time I did it."

Mr. Altshuler. That is all. And counsel representing the defendant rejected that.

In this case let us take the same situation and see what happens to it. Say counsel in this case had suggested no defense of insanity, as he did by offering the plea of guilty. That would be subject to an attack as ineffective assistance of counsel in our opinion for this reason: He had a report in testimony of a psychiatrist that at the time of the com-

mission of the crime this man was not legally responsible for that act.

Now, as Your Honor may recall, I think in the *Liles* case, an attorney came up and asked for a mental examination, also over in the Municipal Court. The judge said you haven't made out a prima facie showing. Then the attorney turned around and said, after a consultation with his client, we now offer to plead guilty. They appealed that decision. The Court of Appeals reversed. They said there is a serious question in our mind that counsel can first raise the question of a mental examination and then when that is rejected by the court turn around and let the man plead guilty.

And that is what counsel was in effect doing in this case. He had testimony which he could offer and he didn't offer it but the Government offered it to the court showing that this man was definitely insane at the time of the commission of the crime. The report clearly shows it and the testimony clearly shows it. Counsel had no right to abandon that defense, and to offer to plead that man guilty. He would have been considered ineffective and subject to reversal. If the Court of Appeals did that on a motion merely for a mental examination, then they certainly would have done it on a conviction.

As far as the due process, this man has a right to habeas corpus any time.

The Court. He says he is not raising the question of his mental condition. Probably he couldn't get out on habeas corpus as to his mental condition. The issue here is: Was he properly committed in the first place?

[fol. 18] Mr. Altshuler. There was some evidence before the court that this man at the time of the commission of the crime was of unsound mind, a specific report from the psychiatrist and testimony. No court could look at that record and ignore it and allow the man to plead guilty when he knows that he had a lawful defense to the crime. No counsel can offer to plead a client guilty when he knows he has a lawful defense to that crime.

Mr. Arens. May I answer very briefly, your Honor?

The Court. Yes.

Mr. Arens. If your Honor please, the difficulties appear to arise from the application of *Clark v. United States*,

which was cited by counsel for the Government, and that, as Your Honor will probably recall, was prosecution for murder in the first-degree in which defendant from the witness stand deliberate asserted that he had been insane at the time of the crime, and the Court of Appeals out of a careful concern for the preservation of human life in a situation so precarious reversed and declared that the defense of insanity thus raised in the District Court could not be abandoned.

The *Williams* case clearly and unequivocally shows that the civil commitment law was established to prevent improvident commitment, that a person who deserves commitment on a lifetime basis by and large should be entitled to a careful investigation by the Mental Health Commission, before the District Court with a jury if requested.

And surely, the Court of Appeals made it as plain as it could in *Williams v. Overholser* that there could be no shortcutting of these particular procedures without undercutting the basic liberties of us all.

And may I say this: If municipal courts, or for that matter district courts, in petty criminal cases were to be permitted to act as their own advocates and call witnesses as to the sanity or insanity of the individual defendant, then surely they would be conducting a trial within a trial, the basic deprivation inflicted or threatened to be inflicted under these circumstances being commitment to a mental hospital, and not commitment to a prison, and under these circumstances surely the defendant would be entitled to notice, [fol. 19] he would be entitled to free psychiatrists at government expense who might be able to say no, he was not insane at the time of the crime. He has a right to plead guilty, and certainly no such facilities were afforded to the defendant in this instance.

.

The Court. I don't believe that the Municipal Court had a right to convert this proceeding into a civil commitment proceeding, which is what it did. Therefore, I don't think the Municipal Court had jurisdiction to commit him to St. Elizabeths. I will grant the writ.

[fol. 20] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Habeas Corpus No. 130-60

FREDERICK C. LYNCH,

v.

WINFRED OVERHOLSER

ORDER—June 27, 1960

This matter came before the Court on a petition for a writ of habeas corpus and for other relief, and respondent's Return and Answer thereto; and upon consideration thereof, and of oral argument in open court, the petitioner being present, and petitioner and respondent being represented by counsel, the Court finds:

(1) Petitioner was charged with passing bad checks in Municipal Court proceedings; he initially entered a plea of not guilty and subsequently attempted to change his plea to one of guilty;

(2) the Municipal Court refused to permit the petitioner to enter a guilty plea notwithstanding the fact that it had found petitioner competent to participate in the proceedings after mental examination;

(3) the Municipal Court thereupon heard evidence upon the charges over the petitioner's objection; the evidence offered by the government as part of its case in chief included the testimony of one physician representing the District of Columbia General Hospital Psychiatric Division who testified that the petitioner was mentally competent to stand trial on the charges then pending against him but that the crimes of which the petitioner was charged were the product of mental illness;

[fol. 21] (4) no testimony was offered by the petitioner either with respect to the offenses charged against him or his mental condition at the time said offenses were committed;

(5) the Municipal Court thereupon entered a judgment of acquittal by reason of insanity and ordered the petitioner

committed to St. Elizabeths Hospital, pursuant to 24 D. C. Code, Section 301, as amended;

(6) the Municipal Court lacked jurisdiction to effect such a commitment and thereby permit the government to obtain commitment of the petitioner as of unsound mind by use of a criminal proceeding in substitution for civil commitment procedures established by law;

(7) that petitioner, therefore, is illegally detained at St. Elizabeths Hospital.

Wherefore, it is this 27th day of June, 1960

Ordered that the writ of habeas corpus shall issue and the petitioner be restored to his liberty unless within ten days from the date of this Order, or such extension thereof as may be granted by this Court for good cause shown, civil proceedings for the commitment of the petitioner shall be instituted, in which event the petitioner shall remain in the custody of the respondent until final determination of said civil proceedings.

Joseph C. McGarraghy, Judge.

N. D.C. Man
US 7736-59
No.

DEC 9 1950
Cont 12/17/51
Req of Court
fitted

UNITED STATES

Frederick C. Lynch 3070 Div.
Terr N. C.

CR 236 314

SEE ATTACHED LETTER SETTING
FORTH THE RESULTS OF THE MENTAL
EXAMINATION AND EVALUATION OF
THE DEFENDANT.

CHECK LAW

ACT OF JULY 1, 1928

at J. J. ...

Witnesses:

A. P. Ellis Sherraton Carlton Hotel
Paul Pierpont 923 16th St NW
Paris Pully
E. F. Grafton Check Sq.

DEC 9 1950
Cont 12/15/51
Req of Court
No Bond
Committed

DEC 9 1950

Cont 12/3/51

The Court Requests Mental
Examination of this Defendant

DEC 15 1950
Cont 12/27/51
Req of Court
Committed

DEC 20 1950

THE COURT

Judgment Not Guilty
by Reason of Insanity

Committed

Joseph M. ...

See Inside

(247)

FILED

JUL 8 1960

BARRY M. ...

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20535

NOV 26 1950

FILED

[fol. 23]

Cliver Gorch

Attorney of the United States in and for the District of

Columbia, who, for the said United States, prosecutes in this behalf, by *M. R. Davis*

, one of his assistants, comes here into Court, at the District afore-

said, on the 6th day of November

in the year of our Lord one thousand

nine hundred and 99, in this said Term, and for the said United States,

gives the Court here to understand and be informed, on the oath of one E. P. Grafton

FILED

late of the District aforesaid, on the 11th day of October 1909

in the year of our Lord one thousand nine hundred and 99

at the District aforesaid, and within the jurisdiction of this Court, with intent to defraud, did make,

draw, utter, and deliver to one Allen P. Ennis, a certain paper writing

in the form of a bank check upon a certain banking institution doing business in Washington

under the name and style of Riggs National Bank, for

the payment of money of the value of \$50.00 dollars and cents in the national

currency of the United States of America, knowing at the time of said making, drawing, uttering, and

delivering of said check that he, the said Frederick C. Lynch, did not have sufficient funds

in or credit with the bank for the payment of said check in full upon its presentation; and he, the said

Frederick C. Lynch, did not pay the said Washington Sheraton Corp. t/a, the

Sheraton Carlton Hotel

holder of said check, the amount due thereon within five days after receiving notice that said check had

not been paid by said bank;

against the form of the statute in such case made and provided, and against the peace and Government of

the United States of America.

Whereupon, the said Attorney of the United States, who, in this behalf, prosecutes for the said United

States, in manner and form as aforesaid, prays the consideration of the Court here in the premises, and

that due proceedings may be had against the said

Frederick C. Lynch

in this behalf to make him answer to the said United States touching and concerning the premises

aforesaid.

Cliver Gorch

Attorney of the United States
in and for the District of Columbia.

By *M. R. Davis*
His said Assistant.

E. P. Grafton

Personally appeared before me this

6th day of November, A. D. 19 09, and being

duely sworn according to law doth declare and say that the facts as set forth in the foregoing information

are true.

M. R. Davis
Assistant Attorney of the United States
in and for the District of Columbia.

[fol. 24] Filed July 8, 1960. Harry M. Hull, Clerk

ATTACHMENT TO INFORMATION

GOVERNMENT OF THE DISTRICT OF COLUMBIA
D. C. General Hospital
19th Street and Massachusetts Avenue, S. E.
Washington 3, D. C.

December 4, 1959.

Unsound Mind Was Set 12-17-59
Now 12-9-59

Attorney J. M. Jones

H. C. 130-60

Re: Frederick Lynch, US 7737 & 36-59

Mr. Walter Bramhall,
Criminal Clerk's Office,
Municipal Court,
Washington 1, D. C.

Attention: Mr. Robert Ernst.

DEAR SIR:

This patient was admitted to the District of Columbia General Hospital on November 6, 1959.

Psychiatric examination reveals Mr. Lynch to be of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense.

Mr. Lynch has shown some improvement since his admission to this hospital but it is recommended that he be committed to a psychiatric hospital for further care and treatment.

Sincerely yours, James A. Ryan, M.D., Assistant
Chief Psychiatrist.

A true copy. Test: Walter F. Bramhall, Clerk, Municipal Court, D. C. By Joseph M. Burton, Deputy Clerk.
JAR:amt

[fol. 25] Filed July 8, 1960. Harry M. Hull, Clerk

ATTACHMENT TO INFORMATION

GOVERNMENT OF THE DISTRICT OF COLUMBIA
D. C. General Hospital
19th Street and Massachusetts Avenue, S. E.
Washington 3, D. C.

H. C. 130-60

December 28, 1959.

Re: Frederick Lynch, US 7737 & 36-59

Mr. Walter Bramhall,
Criminal Clerk's Office,
Municipal Court,
Washington 1, D. C.

Attention: Mr. Robert Ernst.

DEAR SIR:

This patient was admitted to the District of Columbia General Hospital on November 6, 1959. On December 4, 1959 he was reported to the Court as being of unsound mind, and unable to understand the charges against him.

Since the time of our report, Mr. Lynch has shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense. In my opinion he was suffering from a mental disease, i.e., a manic depressive psychosis, at the time of the crime charged. Such an illness would particularly affect his judgment in regard to financial matters, so that the crime charged would be a product of this mental disease.

At the present time Mr. Lynch appears to be in an early stage of recovery from manic depressive psychosis. It is thus possible that he may have further lapses of judgment in the near future. It would be advisable for him to have a period of further treatment in a psychiatric hospital.

Sincerely yours, James A. Ryan, M.D., Assistant
Chief Psychiatrist.

A true copy. Test: Walter F. Bramhall, Clerk, Municipal Court, D. C. By Joseph M. Burton, Deputy Clerk.

JAR:acb

7731-50

US 7731-50

UNITED STATES

Franklin D. Roosevelt
3300 New York
100-000

CHECK LAW

100-000

100-000

100-000

100-000

100-000

Cont 12/3/59

100-000

100-000

100-000

100-000

Cont 12/17/59
Reg of Govt
Advised

THE ATTORNEY GENERAL
FROM THE DEPT. OF THE INTERIOR
IN RESPONSE TO REQUEST OF
THE DEPT. OF JUSTICE

Cont 12/15/59
Reg of Govt
Advised

Cont 12/29/59
Reg of Govt
Advised

100-000
100-000
100-000
Judgment of Security
Department of Justice
Committee

FILED

page in Butler

District of Columbia } at

November

Term, A. D. 1939.

Oliver South

Attorney of the United States in and for the District of

Columbia, who, for the said United States, prosecutes in this behalf, by *M. R. Davis*

one of his assistants, comes here into Court, at the District aforesaid, on the 6th day of November in the year of our Lord one thousand nine hundred and 99, in this said Term, and for the said United States, gives the Court leave to understand and be informed, on the oath of one *Edw. E. Griffin*

that one *Frederick Cornelius Igush*

FILED

JUL 5 1939

into of the District aforesaid, on the 20th day of October in the year of our Lord one thousand nine hundred and 99

at the District aforesaid, and within the jurisdiction of this Court, with intent to defraud, did make, draw, utter, and deliver to one *Allan P. Smith*

in the form of a bank check upon a certain banking institution doing business in Washington, D.C., under the name and style of *First National Bank* for the payment of money of the value of \$0.00 dollars and cents in the national

currency of the United States of America, knowing at the time of said making, drawing, uttering, and delivering of said check that he, the said *Frederick Cornelius Igush*, did not have sufficient funds

in or credit with the bank for the payment of said check in full upon its presentation; and he, the said *Frederick Cornelius Igush*, did not pay the said *Allan P. Smith* / *Shawston Coal, the* holder of said check, the amount due thereon within five days after receiving notice that said check had not been paid by said bank;

against the form of the statute in such case made and provided, and against the peace and Government of the United States of America.

Whereupon, the said Attorney of the United States, who, in this behalf, prosecutes for the said United States, in manner and form as aforesaid, prays the consideration of the Court here in the premises, and that due proceedings may be had against the said *Frederick C. Igush*

in this behalf to make a true answer to the said United States touching and concerning the premises aforesaid.

Attorney of the United States
in and for the District of Columbia.

By *M. R. Davis*
His said Assistant.

Personally appeared *E. F. Griffin*

before me this

6th day of November

A. D. 1939, and being

duly sworn according to law doth declare and say that the facts as set forth in the foregoing information are true.

667 622

EX.

M. R. Davis
Assistant Attorney of the United States

[fol. 28] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Habeas Corpus No. 130-60

FREDERICK C. LYNCH, PETITIONER,

vs.

WINFRED OVERHOLSER, RESPONDENT

STIPULATION—Filed July 8, 1960

It is hereby stipulated by counsel for the petitioner and counsel for the respondent in the above-captioned case, that certified copies of the Municipal Court Informations in the cases of *United States v. Lynch* (Municipal Court Nos. U.S. 7736-59 and 7737-59) and the certified copies of the hospital reports attached to U.S. 7736-59, be filed in this case, Habeas Corpus No. 130-60, and then be transmitted forthwith to the Court of Appeals, together with this stipulation, as a supplemental record on appeal.

Oliver Gasch, per MRD, United States Attorney.
Carl W. Belcher, per MRD, Assistant United
States Attorney. Maurice R. Dunie, Assistant
United States Attorney. Attorneys for Respondent.
Richard Arens, per MRD, Attorney for Petitioner.

Dated July 8, 1960.

Proof of service (omitted in printing)

[fol. 29] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

Habeas Corpus No. 130-60

FREDERICK C. LYNCH, Petitioner,

VS.

WINFRED D. OVERHOLSER, Respondent

NOTICE OF APPEAL—Filed July 1, 1960

Notice is hereby given this 1st day of July, 1960, that the respondent, Winfred D. Overholser, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 27th day of June, 1960 in favor of the petitioner, Frederick C. Lynch, against said respondent, Winfred D. Overholser.

Oliver Gasch, per MRD, Attorney for Respondent.
United States Attorney.

Proof of service (omitted in printing)

[fol. 30] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

No. 15859

WINFRED OVERHOLSER, SUPERINTENDENT, St. Elizabeths
Hospital, Appellant

v.

FREDERICK C. LYNCH, Appellee

Appeal from the United States District Court for the
District of Columbia Circuit

OPINION—Decided January 26, 1961

Mr. Maurice R. Dunie, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, and Carl W. Belcher, Assistant United States Attorney, were on the brief, for appellant.

Mr. Richard Arens, with whom Messrs. Lawrence Speiser and James Mitchell Jones were on the brief, for the appellee.

Before Wilbur K. Miller, Chief Judge, and Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, sitting in banc.

Bastian, Circuit Judge, with whom Wilbur K. Miller, Chief Judge and Prettyman, Washington, Danaher and Burger, Circuit Judges, concur:

On November 6, 1959, appellee [defendant in the trial court] came before the Municipal Court for the District [fol. 31] of Columbia on informations charging two violations of the bad check law, § 22-1410 D. C. Code (1950). Pursuant to § 24-301 (a) D. C. Code (Supp. VIII, 1960), the trial judge ordered appellee committed to District of Columbia General Hospital for mental observation, and appellee entered that hospital the same day. A report from the hospital was received by the court on December 4, 1959, stating that appellee was at that time

incompetent to stand trial. Under the provisions of §24-301(a), the trial judge ordered that appellee remain at the hospital for treatment. On December 28, 1959, a second report was received from the hospital stating that appellee had improved and was then competent to stand trial. The psychiatrist who wrote the report went on to state that, in his opinion, appellee was a manic-depressive, manic type, and that this disease particularly affects financial judgment. He further stated that, in his opinion, appellee's crimes were the product of this mental disease or defect and that appellee required further treatment to insure against repetition of the offenses. This report was in accordance with our ruling in *Winn v. United States*, *infra*.

On December 29, 1959, appellee was brought to trial and was represented by counsel. When his case was called, appellee sought to withdraw the not guilty plea which he had entered earlier and to enter a plea of guilty. The trial judge, having before him the report that appellee was not mentally competent when the acts were committed, refused to allow a change in the plea and proceeded to conduct a trial on the charges. During the course of this trial, the psychiatrist who had examined appellee testified,¹ over [fol. 32] objection, as to appellee's mental condition at the

¹ In *Berger v. United States*, 295 U.S. 78, 88 (1935), the Supreme Court said:

"The United States Attorney is representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but *that justice shall be done*. As such he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer" [Emphasis supplied.]

We think that the aim "that justice shall be done" applies at least equally to the courts. We therefore agree with the Government that it does not matter whether the psychiatrist was called by the court or by the Government; in either case, he was properly called.

time of the commission of the offenses. At the trial, it appears that appellee took the stand and denied essential elements of the crimes with which he was charged. At the conclusion of the case, the trial judge found the appellee not guilty by reason of insanity and, pursuant to §24-301(d) D. C. Code (Supp. VIII, 1960), ordered him committed to St. Elizabeths Hospital. No appeal was taken.

On June 13, 1960, appellee filed a petition for a writ of habeas corpus in the District Court, to test the legality of his detention at St. Elizabeths. That court held that the Municipal Court was without jurisdiction to commit appellee in the manner described above and, on June 27, 1960, ordered that he be released unless civil commitment proceedings were instituted within ten days of the date of the order.

At the outset of the case in the Municipal Court, the trial judge was faced with the clear mandate of §24-301(a), which reads in pertinent part:

"Whenever a person is . . . charged by information . . . with an offense and, prior to the imposition of sentence . . . it shall appear to the court from the court's own observations . . . that the accused is of unsound mind or is mentally incompetent so as to make him unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to . . . [a] mental hospital . . . for [a] reasonable period . . . for examination and observation and for care and treatment [fol. 33] if such is necessary If . . . the superintendent of the hospital . . . shall report that in his opinion the accused is of unsound mind or mentally incompetent, *such report shall be sufficient to authorize the court to commit . . . the accused to a hospital for the mentally ill unless the accused or the Government objects*, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial . . ." [Emphasis supplied.]

This statute is similar to 18 U.S.C. § 4244 (1958), the major difference being that, under the latter section, a judicial determination, after hearing, must always be made, following receipt of the psychiatrist's report. The trial judge thus properly committed appellee to D. C. General Hospital for observation and, after receipt of the December 4 report, for treatment.

When the report of December 28 was received, the trial judge, pursuant to § 24-301(b), properly held that appellee was then competent to stand trial. That section reads in pertinent part:

"Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent . . . the superintendent shall certify such fact . . . and *such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial, unless the accused or the Government objects. . . .*" [Emphasis supplied.]

The trial judge thus, on December 29, found appellee competent to stand trial, in the manner in which he originally found him incompetent, both actions being taken pursuant to clear and unambiguous statutory mandates.

We do not quarrel with the operation and effect of § 24-301(a) and (b); indeed, we heartily endorse them. For a defendant who is subjected to trial while mentally incompetent to understand the charges against him and unable to assist in his own defense has not really been [fol. 34] tried at all, certainly not in the sense of a "fair" trial, which is the basic element of the due process guaranteed by the Constitution. See the colloquy, at a hearing on S. 850, 80th Cong., 2d Sess. (1948), between Judge Magruder and Senator Wiley, quoted by this court with approval in *Gunther v. United States*, 94 U.S.App.D.C. 243, 245, 215 F.2d 493, 495 (1954).

Under a section of a statute which is not attacked here, appellee was properly found incompetent to stand trial and committed to a mental hospital. Subsequently, under

another section of the same statute, he was found competent to stand trial and counsel was appointed for him. At this point, immediately before his trial was scheduled to begin, appellee sought to withdraw the not guilty plea which had been entered previously and to enter a plea of guilty. The trial judge did not permit the plea to be changed and proceeded to try the case. Rule 9, MUN. CT. CRIM., states:

"A defendant may plead not guilty, guilty. . . . The court *may* refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge" [Emphasis supplied.]

This is an exact copy of FED. R. CRIM. P. 11. Appellee contends that the "shall not" clause modifies the first clause of this rule, with the net effect that the only circumstance in which a plea of guilty is properly refused is that outlined in the second clause. We do not think this is the case. In *Tomlinson v. United States*, 68 App. D.C. 106, 93 F.2d 652, *cert. denied*, 303 U.S. 646 (1937), this court said:

"An application by a defendant to change his plea is addressed to the sound discretion of the court, and the action of the court will not be disturbed, unless there has been an abuse of that discretion." 68 App. D.C. at p. 108, 93 F.2d at p. 654.

[fol. 35] We think the above language is clearly consistent with the Municipal Court's Rule 9. The permissive clause beginning with "may" indicates a general discretion in the court, while the mandatory clause beginning with "shall not" indicates one circumstance where the court has no discretion but must refuse to permit the guilty plea.

We turn now to the issue of whether the trial judge abused his discretion in refusing to permit the guilty plea.

Procedure markedly similar to that called for by 18 U.S.C. § 4244 is outlined in § 24-301(a) and (b) of the D. C. Code, and this court has consistently held that an examination conducted under § 4244 to determine a defendant's competency to stand trial must be broad enough to in-

clude an inquiry into his mental condition at the time the act in question was committed. *Winn v. United States*, 106 U.S.App.D.C. 133, 270 F.2d 326 (1959); *Calloway v. United States*, 106 U.S.App.D.C. 141, 270 F.2d 334 (1959). It would be illogical and inconsistent in the extreme for this court now to hold that the doctrine of *Winn* and *Calloway* does not apply to § 24-301(a) and (b) of the D. C. Code. Therefore, the psychiatrist's reports which were before the Municipal Court properly included evaluation of appellee's mental condition at the time the acts complained of were committed.

Perhaps we can not say that at that point the trial judge *knew* that appellee was not guilty of the crimes charged by reason of insanity but we certainly can say that he had every reason, at that point, to believe that there was grave doubt about appellee's criminal culpability and that the issue should be litigated. The preceding statement, of course, is based on the *Davis* rule² that insanity is not strictly an affirmative defense and can be raised by either the court or the prosecution.

[fol. 36] In *Carter v. United States*, — U.S.App.D.C. —, 283 F.2d 200 (1960), we considered the converse of the present problem, that is, whether it was error for the trial judge to fail to order on his own motion a pre-trial mental examination of the defendant. Holding that that was a matter for the judge's discretion, we went on to say:

"But the existence of these possibilities [civil commitment and transfer of the prisoner under 18 U.S.C. § 4245] does not relieve the bench and bar of the responsibility of endeavoring to reach at the earliest possible stage—ideally prior to trial and sentence—the approach to a particular case which appears most just and appropriate, having regard to the individual's mental condition, his history, and the possibility of rehabilitating him and restoring him to usefulness in the community." [Emphasis supplied.]

This statement would seem squarely applicable to the present case. "Just result": It will be shown later that a criminal sentence can in no wise be considered "just

² 160 U.S. 469 (1895).

treatment" in such a case. "The individual's mental condition": A psychiatrist's report indicating that appellee was a sick man in need of treatment was before the judge. "Rehabilitation" and "restoration to usefulness": These considerations have been prime movers in the development of our present law of criminal insanity; certainly hospitalization was the very thing needed by appellee.³ Certainly, by all the criteria expressed in *Carter*, not only was the action here far from an abuse of discretion, but also it would seem affirmatively to have been the best possible decision, if not the only just one.

In *Holloway v. United States*, 80 U.S.App.D.C. 3, 4-5, 148 F.2d 665 (1945), this court said: "Our collective conscience does not allow punishment where it cannot impose blame." In *Douglas v. United States*, 99 U.S.App.D.C. [fol. 37] 232, 239 F.2d 52 (1956), we clearly pointed to the distinction between punishment for criminal conduct and treatment for mental disease, and we indicated our awareness of the necessity for determining which of the two procedures is appropriate for a particular case.

"That one who commits a wrong by reason of insanity must be acquitted is so well-settled that no one questions it . . . Only the guilty are to be punished. For the merely dangerous, society provides other treatment." [Emphasis supplied.] *Blunt v. United States*, 100 U.S.App. D.C. 266, 278, 244 F.2d 355, 367 (1957).

In *Williams v. United States*, 102 U.S.App.D.C. 51, 57-58, 250 F.2d 19, 25-26 (1957), we clearly stated that imprisonment was *wrong* in the case of a mentally ill person, as well as a remedy which could not possibly secure the community against repetition of the offense. "Under our criminal jurisprudence, mentally responsible law breakers are sent to prison; those who are not mentally responsible are sent to hospitals. . . . It is both wrong and foolish to punish where there is no blame. . . . The community's security may be better protected by hospitalization . . . than by imprisonment."

The cases above cited establish almost a positive duty

³ At the present time, appellee has responded to treatment and has been conditionally released.

on the part of the trial judge not to impose a criminal sentence on a mentally ill person. In this case appellee had never before been convicted of a criminal offense and had previously served honorably as a commissioned officer in the armed forces. We suggest it would have been a plain abuse of discretion for the trial judge, in these circumstances, to allow a plea by which society would brand such a person with a criminal record. Appellee argues that the plea of guilty had been carefully considered by competent counsel and by appellee, who had been judicially declared competent to stand trial and to assist in his own defense. We think that, for the reasons stated above, this decision was one which appellee and his counsel did not [fol. 38] have an absolute right to make. We might add that the foregoing reasoning omits consideration of *Clark v. United States*, 104 U.S.App.D.C. 27, 259 F.2d 184 (1958), and *Tatum v. United States*, 88 U.S.App.D.C. 386, 190 F.2d 612 (1951) where we held that trial counsel had no right to concede his client's sanity; and *Plummer v. United States*, 104 U.S.App.D.C. 211, 260 F.2d 729 (1958), where we held, in effect, that failure of trial counsel to raise the defense of insanity was ineffective assistance of counsel under 18 U.S.C. § 2255. Appellee's argument on this point impliedly calls for reversal of *Plummer*, if not *Tatum* and *Clark* as well. This we are unwilling to do. Society has a stake in seeing to it that a defendant who needs hospital care does not go to prison.

In the light of the previous discussion in this opinion, we are convinced that criminal insanity is a matter of grave public concern, particularly with respect to the problem of rehabilitation. Once it is established that the defendant did in fact commit the act charged but that he was insane at the time, then the problem is one of rehabilitation. In this context, the only issue is whether the defendant will go to jail for punishment or to a hospital for treatment. In either event he will be confined, deprived of his absolute liberty.

By its very nature, a jail sentence is for a specified period of time, while, by its very nature, hospitalization, to be effective, must be initially for an indeterminate period. This difference is not fatal because of the overriding interest of the community in protecting itself and its

interest in rehabilitating the defendant himself. Certainly a man is not truly free if he has a sickness which results in his continual criminal activity, which, in turn, leads to a life-time in jail, with only short breaks between sentences. In the case before us, had Lynch not been treated, he might have been in and out of jail for the rest of his life on bad check charges. Now that he [fol. 39] has received treatment, he is well on the way to unconditional release, without the probability of repeat offenses.

Therefore, once it is determined that a defendant is to be hospitalized for treatment of a mental disease or defect, further consideration of the criminal penalty provided by statute becomes irrelevant, for any and all purposes. The length of his hospitalization must depend solely on his need (or lack of it) for further treatment. It is true that he may be hospitalized for a longer time than the maximum jail sentence provided by statute. It is equally true that he may be released in a shorter time than the minimum sentence. Hospitalization, in this respect, bears no relation to a jail sentence. A jail sentence is punitive and is to be imposed by the judge within the limits set by the legislature. Hospitalization is remedial and its limits are determined by the condition to be treated. As we said in *O'Beirne v. Overholser*, No. 15,634 decided by this court November 23, 1960, — U.S.App.D.C. —, — F.2d —:

"[A person committed to St. Elizabeth's under § 24-301 after a verdict of not guilty by reason of insanity] is not a 'prisoner'; he is not under 'sentence.' . . . He is an 'accused person confined to a hospital for the mentally ill,' to quote the words of the statute."

In *Overholser v. Russell*, — U.S.App.D.C. —, 283 F.2d 195 (1960), we said that mandatory commitment under § 24-301(d) was proper even in the case of non-violent crimes (coincidentally, bad check charges) because, even in the case of non-violent crimes, society has a great interest in protecting itself.

Once a man has been committed to a hospital under § 24-301(d), we do not think, as did the District Judge, that the Government should thereafter be forced to prove

his insanity as the price of continuing treatment. The remedy afforded by habeas corpus under present well [fol. 40] settled law permits a person so confined to obtain his release through the courts by establishing that he has met the tests for such relief laid down in the governing statute.*

A number of factual questions have been raised by counsel in brief and in argument as to what actually occurred in the trial court. Unfortunately no reporter was present at the Municipal Court proceedings, but this does not in any way affect the jurisdiction of the Municipal Court to take the action challenged. A presumption of regularity attaches to the proceedings of a trial court in the absence of an appeal, and we are bound by that presumption, unless and until a showing has been made that the judgment is so defective as to be subject to collateral attack, under the rules applicable in *habeas corpus*. See *O'Beirne v. Overholser, supra*. No such showing has been made here.

We hold that the Municipal Court's action was correct as to all the points properly raised by the *habeas corpus* proceeding, and therefore the order of the District Court is

Reversed.

FAHY, Circuit Judge, with whom EDGERTON and BAZELON, Circuit Judges join, dissenting: Frederick C. Lynch, appellee, petitioned the District Court for a writ of habeas corpus to obtain his release from restraint at St. Elizabeths Hospital. Appellant, the Superintendent of the Hospital, interposed as legal basis for the restraint an order of the Municipal Court of the District of Columbia of December 29, 1959, committing appellee to the Hospital pursuant to the provisions of 24 D.C. Code § 301(d), as amended, "after having been found not guilty by reason [fol. 41] of insanity on charges of Passing Bad Checks." The charges were misdemeanors involving two checks of \$50 each cashed in October 1959.

As a result of the District Court proceedings Judge

* Cf. *Hill v. United States*, 206 F.2d 204, 207 (6th Cir.), cert. denied, 346 U.S. 859 (1953).

McGarraghy concluded that the Municipal Court lacked jurisdiction to "permit the government to obtain commitment of the petitioner as of unsound mind by use of a criminal proceeding in substitution for civil commitment procedures established by law." He held that petitioner, therefore, was illegally detained at the Hospital and concluded as follows:

[T]hat the writ of habeas corpus shall issue and the petitioner be restored to his liberty unless within ten days from the date of this Order, or such extension thereof as may be granted by this Court for good cause shown, civil proceedings for the commitment of the petitioner shall be instituted, in which event the petitioner shall remain in the custody of the respondent until final determination of said civil proceedings.

I agree with Judge McGarraghy as to the invalidity of the commitment, and in the solution he reached above set forth. Both the public and the private interests are protected by the course he directs: The individual concerned is held no longer by virtue of the invalid trial, and the public as well as the private interests are protected by conditioning the individual's release upon the outcome of future proceedings under our Code, 21 D.C. Code § 306 (1951), for the commitment of persons of unsound mind.

The reasons I think the Municipal Court commitment was invalid are first stated. As the result of pretrial proceedings appellee was found competent to stand trial. He was represented by counsel. When the cases were called for trial he sought to plead guilty, choosing to accept what punishment might be imposed for the two misdemeanors. The court refused to permit the guilty pleas, obviously believing there was a substantial question [fol. 42] whether appellee was of sound mind when the checks were cashed. Thus a serious question arose involving the right of a person accused of a misdemeanor, who is competent to plead guilty and is represented by counsel, not to be compelled by the court to enter a plea of not guilty. I do not find it necessary to resolve this most difficult ques-

tion, because even if it be assumed that the Municipal Court could compel this, and validly did so in this case, nevertheless I think the commitment which eventuated from this trial was invalid for other reasons.

Upon refusing the guilty plea the court then brought on the charges for trial over appellee's objection. We have no transcript of what occurred, and so we cannot accurately reconstruct the events. In this respect the case resembles *O'Beirne v. Overholser*, — U.S. App. D.C. —, — F.2d —. As we could not say there, so we cannot say here, that a fair trial was held in the Municipal Court, with opportunity for appellee to meet the government's case. As near as we can make out from the data we have, the case was turned into an inquiry concerning appellee's sanity at the time the checks were cashed. The evidence consisted of the testimony of a psychiatrist that appellee was of unsound mind at that time. Appellee and his counsel were thus confronted with a serious situation affecting appellee, and the record does not show they were given a reasonable opportunity to cope with it by showing appellee was not of unsound mind when the checks were cashed. In the absence of that opportunity, there could be no valid finding that he was not guilty by reason of insanity. Such data as is before us supports the finding of Judge McGarraghy that the Municipal Court proceeding was not a valid trial but an invalid commitment proceeding. In the absence of a valid trial and acquittal by reason of insanity, there could be no valid commitment to St. Elizabeths under section 24-301(d).

[fol. 43] In *O'Beirne* we remanded for a District Court hearing and findings respecting the fairness of the Municipal Court trial. But the preferable remedy, especially where, as here, more than a year has passed in which the petitioner has been in restraint, is not to order a second District Court hearing about what occurred at the Municipal Court trial, as we did in *O'Beirne*, but to set aside the commitment.

I, of course, agree with the majority that a person

of unsound mind who is charged with crime is not to be sent to prison if the alleged crime was due to his unsoundness of mind. Instead, he should be treated for his condition. See the *Holloway, Douglas, Blunt, and Williams* decisions referred to in the majority opinion. And I readily agree also that criminal insanity is a matter of grave public concern, particularly with respect to the problem of rehabilitation. But these sound general principles are not dispositive of the particular problem raised by the continued restraint imposed upon Lieutenant Colonel Lynch.

In his petition for the writ of habeas corpus appellee does not allege present soundness of mind. He attacks his detention solely on the ground of the invalidity of his commitment.¹ As already stated, I agree with Judge McGarraghy that unless civil proceedings for appellee's commitment are now undertaken, he is entitled to be released on that ground. Moreover, if the judgment of Judge McGarraghy is sustainable upon a ground independent of the one asserted by appellee, it should be affirmed. I think such independent ground does appear and that it deprives the issue of the validity of the Municipal Court proceedings of critical significance. Even if the Municipal Court trial were in all respects valid, followed by a valid mandatory commitment under section [fol. 44] 301(d), appellee's detention would no longer be sustainable on the basis of that commitment.

Section 301(d)—the mandatory commitment provision—and section 301(e)—governing subsequent release—are part of a general plan and are to be read in relationship of one with the other. It is plain that Congress was concerned that an accused person might escape prison by reason of his defense of insanity and be immediately released upon the community, although he had engaged in dangerous conduct. This is what Congress sought to prevent. There is no reason to suppose Congress intended that a person not accused of any dangerous offense and not found to be of unsound mind should be held indefinitely against his will in a mental institution because believed

¹ See *Barry v. Hall*, 68 App.D.C. 350, 98 F.2d 222.

to be a person of bad character; that is, Congress was not establishing a system of "protective" or "preventive" custody of persons neither dangerous nor found to be of unsound mind.

An important factor to be remembered in interpreting the valid scope of section 301(e) is that an acquittal by reason of insanity, which leads to commitment under section 301(d), is not an adjudication of insanity. It is well settled that such acquittal means only that sanity has not been established beyond a reasonable doubt. *Davis v. United States*, 160 U.S. 469; *Isaac v. United States*, — U.S. App. D.C. —, — F.2d —; *Carter v. United States*, 102 U.S. App. D.C. 227, 252 F.2d 608; *Douglas v. United States*, 99 U.S. App. D.C. 232, 239 F.2d 52.² One in appellee's position not only has not been charged with a dangerous offense, but has not been adjudged to be unsound mind.

The dangerousness referred to in section 301(e), upon which continued restraint is conditioned, as I suggested in my concurring opinion in *Raysdale v. Overholser*, — [fol. 45] U.S. App. D.C. —, 281 F.2d 943, 949, and see Judge Bazelon's concurring opinion in *Overholser v. Russell*, — U.S. App. D.C. —, 283 F.2d 195, 198, is related to conduct comparable to the offense charged.³ The offenses charged to appellee, the cashing of two "bad checks" of \$50 each, were not of a dangerous character within the meaning of section 301(e). Therefore the release conditions of that section do not apply in appellee's case and his continued restraint cannot be justified under the criteria of that section. It is not of significance one way or the other that these criteria⁴ are to be read through the gloss of applicable decisions of this court.⁵

² And see generally Halleck, *The Insanity Defense in the District of Columbia*, 49 Georgetown L.J. 294 (1960).

³ See also Goldstein & Katz, *Dangerousness and Mental Illness*, 70 Yale L.J. 225, 235 (1960).

⁴ For unconditional release.

⁵ In *Overholser v. Leach*, 103 U.S. App. D.C. 289, 292 257 F.2d 667, 670, it is said the person must be free from "such abnormal mental condition as would make the individual dangerous to himself or the community in the reason-

Whichever criteria are followed it remains true, I think, that Congress in section 301(e) is not concerned with persons who have engaged in any kind of unlawful conduct, however minor, but only with persons who have engaged in unlawful conduct of a dangerous character. The language used conveys the idea of physical danger to persons and, perhaps, to property. I do not attempt to delineate precisely the boundaries fixed by the language used, but obviously they do not encompass any and every minor conflict with the law of which a person has been acquitted because of a doubt about his sanity. Had Congress intended such a broad coverage, it would have used broader language such as "likely to engage in unlawful conduct," rather than the narrow language of section 301 (e), "dangerous to himself or others."

Our jurisprudence knows no such thing in times of peace as "preventive" or "protective" custody of persons not guilty of crime and not found to be of unsound mind. Congress, of course, was aware of this and did not cloud its enactment with grave constitutional doubts by requiring a person of sound mind to be held under restraint in a mental institution on the theory he had done an act having the elements of a minor and non-dangerous offense.⁶ The most serious constitutional doubts are avoided by giving the provisions of section 301(e) their natural meaning which excludes non-dangerous conduct. It fol-

ably foreseeable future." This was approved in *Ragsdale v. Overholser*, — U.S. App. D.C. —, 281 F.2d 943. In *Overholser v. Russell*, — U.S. App. D.C. —, 283 F.2d 195, it is said the person must show (1) that he has recovered his sanity; (2) that he will not in the reasonable future be dangerous to himself or others; and (3) that the Superintendent acted arbitrarily and capriciously in refusing so to certify and to recommend unconditional release. See, however, Judge Bazelon's concurring opinion pointing out that since the issues of violence and non-violence were not presented by the record, the court's comments are dicta. Proof of arbitrariness and capriciousness is required also by *Leach*, and no less is required by *Ragsdale*.

⁶ There was no finding of insanity such as underlay the assumption on which *Orencia v. Overholser*, 82 U.S. App. D.C. 285, 163 F.2d 763, was decided by this court.

lows that valid restraint of appellee depends upon a finding, never yet made, that he is of unsound mind¹ and [fol. 47] not upon meeting the conditions for release applicable to persons committed under section 301(d). On the issue of his present soundness of mind, appellee's prior conduct, as well as his present condition, may of course be considered insofar as relevant.²

I would affirm the judgment of the District Court.

¹ The contrast of section 301(e) with the federal statutory provisions concerning continued detention of federal prisoners as set forth in 18 U.S.C. §§ 4247-48 (1958) has some significance. If upon a hearing the court for the district in which the prisoner is confined shall determine that the prisoner is insane or mentally incompetent, and that if released he will probably endanger the safety of the officers, the property, or other interests of the United States, the detention of the prisoner is authorized. Such commitment, however, shall terminate when the sanity or mental competency of the person is restored or when the mental condition of the person is so improved that if he be released he will not endanger the safety of the officers, the property, or other interests of the United States; that is, he is to be released if sane or mentally competent. (Emphasis added.)

² No doubt a hearing and determination on the question of appellee's present soundness of mind could be had in the habeas corpus proceedings. See *Stewart v. Overholser*, 87 U.S. App. D.C. 402, 186 F.2d 339. But appellee does not appeal from the disposition directed by Judge McGarraghy, which calls for the civil commitment procedures of the Code.

[fols. 48-50] [File endorsement omitted]

**IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

Habeas Corpus 130-70

No. 15,859

**WINFRED OVERHOLSER, Superintendent, St. Elizabeths Hos-
pital, Appellant,**

v.

FREDERICK C. LYNCH, Appellee

**Appeal from the United States District Court for the
District of Columbia**

**Before: WILBUR K. MILLER, Chief Judge, and EDGERTON,
PRETTYMAN, BAZELON, FAHY, WASHINGTON, DANAHY, BAS-
TIAN and BURGER, Circuit Judges, sitting in banc.**

JUDGMENT—January 26, 1961

This cause came on to be heard before the Court in banc on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court for further proceedings not inconsistent with the opinion of this Court.

Per Circuit Judge Bastian.

Dated: Jan. 26, 1961.

**Chief Judge Wilbur K. Miller and Circuit Judges Pretty-
man, Washington, Danahy and Burger concur in Judge
Bastian's opinion.**

**Separate dissenting opinion by Circuit Judge Fahy with
whom Circuit Judges Edgerton and Bazelon join.**

[fol. 51] Clerk's Certificate to foregoing transcript
omitted in printing

[fol. 52] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1960

No. 1020 Misc.

FREDERICK C. LYNCH, Petitioner,

VS.

WINFRED OVERHOLSER, Superintendent, St. Elizabeths
Hospital

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI
—June 19, 1961.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit.

On Consideration of the motion for leave to proceed here-
in in forma pauperis and of the petition for writ of cer-
tiorari, it is ordered by this Court that the motion to pro-
ceed in forma pauperis be, and the same is hereby, granted;
and that the petition for writ of certiorari be, and the same
is hereby, granted. The case is transferred to the appel-
late docket as No. 1046.

And it is further ordered that the duly certified copy of
the transcript of the proceedings below which accompanied
the petition shall be treated as though filed in response to
such writ.

INDEX

Opinions below.....	Page 1
Jurisdiction.....	1
Questions presented.....	1
Statutes and rule involved.....	2
Statement.....	2
Argument.....	6
Conclusion.....	20
Appendix.....	21

CITATIONS

Cases:

Calloway v. United States, 270 F. 2d 334.....	11
Carter v. United States, 252 F. 2d 608.....	7
Carter v. United States, 283 F. 2d 200.....	11
Clark v. United States, 259 F. 2d 184.....	15
Curry v. Overholser, 287 F. 2d 137.....	15
Darr v. Burford, 339 U.S. 200.....	14
Davis v. United States, 160 U.S. 469.....	7, 10
DeMarcos v. Overholser, 137 F. 2d 698, certiorari denied, 320 U.S. 785.....	15
Fisher v. United States, 328 U.S. 463.....	6
Gearhart v. United States, 272 F. 2d 499.....	12
Greenwood v. United States, 350 U.S. 366.....	18
Hawk v. Olson, 326 U.S. 271.....	14
Kercheval v. United States, 274 U.S. 220.....	12
Lewis v. Overholser, 274 F. 2d 592.....	18
McGarty v. O'Brien, 188 F. 2d 151, certiorari denied, 341 U.S. 928.....	15
Overholser v. DeMarcos, 149 F. 2d 23, certiorari denied, 325 U.S. 889.....	15
Overholser v. Leach, 257 E. 2d 667, certiorari denied, 359 U.S. 1013.....	16, 18

Cases—Continued

<i>Overholser v. Russell</i> , 283 F. 2d 195.....	Page 13
<i>Phummer v. United States</i> , 260 F. 2d 729.....	15
<i>Ragdale v. Overholser</i> , 281 F. 2d 943.....	13, 17
<i>Smith v. Baldi</i> , 344 U.S. 561.....	15
<i>Stewart v. Overholser</i> , 186 F. 2d 339.....	18
<i>Talem v. United States</i> , 275 F. 2d 894.....	18
<i>Tatum v. United States</i> , 190 F. 2d 612.....	15
<i>Tomlinson v. United States</i> , 93 F. 2d 652, certiorari denied, 303 U.S. 646.....	10
<i>Walker v. Johnston</i> , 312 U.S. 275.....	14
<i>Williams v. United States</i> , 250 F. 2d 19.....	11
<i>Winn v. United States</i> , 270 F. 2d 326.....	11
<i>Wright v. United States</i> , 250 F. 2d 4.....	7

Statutes:

D.C. Code (1951), Sec. 21-306, <i>et seq.</i>	16
D.C. Code (1951), Sec. 22-1410.....	2, 21
D.C. Code (Supp. VIII, 1960):	
Sec. 24-301.....	16, 22
Sec. 24-301(a).....	2, 22
Sec. 24-301(b).....	23
Sec. 24-301(c).....	23
Sec. 24-301(d).....	4, 7, 12, 13
Sec. 24-301(e).....	8, 23
Sec. 24-301(f).....	25
Sec. 24-301(g).....	25
Sec. 24-301(h).....	25

Miscellaneous:

Federal Rules of Criminal Procedure:

Rule 11.....	9
Second Preliminary Draft (1944), 43.....	9-10
H. Rep. No. 892, 84th Cong., 1st Sess., p. 3.....	12, 13
Krash, <i>The Durham Rule and Judicial Admin- istration of the Insanity Defense in the Dis- trict of Columbia</i> , 70 Yale L. J. 905, 938-940 (1961).....	8

Miscellaneous—Continued

	Page
Municipal Court Civil Rules, Rule 82(b).....	14
Municipal Court Criminal Rules:	
Rule 9.....	5-6, 9, 10, 25
Rule 36.....	14
<i>Report, Royal Commission on Capital Punish-</i>	
<i>ment, 1949-1953 (Cmd. 8932), p. 157.....</i>	18
S. Rep. No. 1170, 84th Cong., 1st Sess., p. 3..	12, 13

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 1020 Misc.

FREDERICK C. LYNCH, PETITIONER

v.

**WINFRED OVERHOLSER, SUPERINTENDENT,
ST. ELIZABETHS HOSPITAL, WASHINGTON, D.C.**

**ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

**BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANT-
ING OF THE PETITION FOR A WRIT OF CERTIORARI**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. "A") is reported at 288 F. 2d 388. No opinion was written by the district court.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1961. The petition for a writ of certiorari was filed on April 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a judge of the Municipal Court of the District of Columbia has jurisdiction, under Rule 9

of the Criminal Rules of that court, to refuse to accept a plea of guilty when the plea is made voluntarily with understanding of the nature of the charge.

2. Whether the trial judge abused his discretion by refusing to permit petitioner to substitute pleas of guilty for previously entered pleas of not guilty when it affirmatively appeared that there was grave doubt as to petitioner's sanity at the time of the commission of the offenses.

3. Whether Section 24-301(d) of the D.C. Code (Supp. VIII, 1960), which provides for the commitment of defendants acquitted solely on the ground of insanity, is restricted in its application to defendants who affirmatively plead the insanity defense.

4. Whether petitioner's acquittal by reason of insanity and his commitment under Section 24-301(d) of the D.C. Code, in the circumstances of this case, deprived petitioner of liberty without due process of law or of the effective assistance of counsel.

STATUTES AND RULE INVOLVED

The applicable statutes and rule involved are set out in the Appendix, *infra*, pp. 21-25.

STATEMENT

On November 6, 1959, two informations were filed in the Criminal Division of the Municipal Court of the District of Columbia, charging petitioner with violations of the bad check law, Section 22-1410 of the D.C. Code, App., *infra*, p. 21 (R. 22, 26). Pursuant to Section 24-301(a) of the D.C. Code, App., *infra*, pp. 22-23, the court ordered petitioner committed to

the District of Columbia General Hospital for a mental examination to determine his competency to stand trial (R. 22, 26; see R. 13). On December 4, 1959, the hospital, through its Assistant Chief Psychiatrist, reported that the psychiatric examination revealed petitioner "to be of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense"¹ (R. 24). On December 28, 1959, the hospital, through the same psychiatrist, submitted a second report, which stated that petitioner had "shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense" (R. 25). The psychiatrist went on to state that, in his opinion, petitioner "was suffering from a mental disease, i.e., a manic depressive psychosis, at the time of the crime charged. Such an illness would particularly affect his judgment in regard to financial matters, so that the crime charged would be a product of this mental disease." The psychiatrist stated further that petitioner appeared "to be in an early stage of recovery from manic depressive psychosis. It is thus possible that he may have further lapses of judgment in the near future. It would be advisable for him to have a period of further treatment in a psychiatric hospital" (R. 25).

¹ The report stated that petitioner had shown some improvement since his admission to the hospital, but recommended that petitioner "be committed to a psychiatric hospital for further care and treatment" (R. 24). Upon receipt of the report, the trial judge, under the provisions of Section 24-301(a), ordered that petitioner remain at the hospital for treatment (C.A.D.C., slip op., p. 2).

4

On the following day—December 29, 1959—petitioner, represented by counsel, was brought to trial (R. 13, 26). Petitioner then sought to withdraw a plea of not guilty which had been previously entered, and to plead guilty to the two informations (R. 13, 20). The trial judge, who had before him copies of the hospital reports of December 4 and December 28, both of which were attached to the informations (R. 26-28), refused to permit petitioner to change his pleas and proceeded to hear evidence on the charges (R. 13, 20). During the course of the ensuing trial, a psychiatrist representing the District of Columbia General Hospital Psychiatric Division testified, over petitioner's objection, that the crimes with which petitioner was charged were the products of mental illness (R. 13, 20).

At the conclusion of the case, the trial judge found petitioner not guilty by reason of insanity, and, pursuant to Section 24-301(d) of the D.C. Code, ordered him committed to St. Elizabeths Hospital (R. 9, 21, 22, 26).

On June 13, 1960, petitioner filed in the District Court for the District of Columbia a petition for a writ of habeas corpus, attacking the legality of his confinement on the grounds (1) that the Municipal Court's refusal to accept his pleas of guilty deprived him of liberty without due process of law; (2) that an "impossible burden" had been placed upon him to rebut the psychiatric evidence (of insanity) because the proof required for his commitment was evidence casting only the slightest reasonable doubt upon his sanity; (3) that his commitment violated

"the safeguards of the civil commitment law embodied in Title 21, D.C. Code, Section 306 *et seq.*"; (4) that his automatic commitment without a judicial finding of present dangerousness (i.e., dangerousness at the time of the trial) deprived him of liberty without due process of law, and (5) that Section 24-301 of the D.C. Code was "unconstitutional on its face and as construed and applied * * *" because it failed to provide for a judicial finding, on competent evidence, of mental illness and dangerousness at the time of the trial (R. 2-4). The petition also contained language which could be construed as alleging that Section 24-301(d) applies only to defendants who affirmatively raise the insanity defense (R. 4).

A hearing was held before the district court (McGarraghy, J.) on June 16, 1960 (R. 12). The court rejected petitioner's attack on the constitutionality of Section 24-301 (R. 15), but concluded (R. 19):

I don't believe that the Municipal Court had a right to convert this proceeding into a civil commitment proceeding, which is what it did. Therefore, I don't think the Municipal Court had jurisdiction to commit him to St. Elizabeths. I will grant the writ.

Accordingly, on June 27, 1960, the court entered an order directing that petitioner be released unless civil commitment proceedings were instituted within ten days of the date of the order (R. 21).

On appeal, the Court of Appeals for the District of Columbia Circuit, sitting *en banc*, reversed, holding that the trial judge's refusal to permit petitioner to change his pleas was consistent with Rule 9 of the

Municipal Court Criminal Rules, *infra*, p. 25, and did not constitute an abuse of discretion.

In a dissenting opinion, Judge Fahy, with whom Judges Edgerton and Bazelon joined, did not reach the issue of the power of the Municipal Court to reject the guilty pleas, but thought that petitioner's commitment was invalid because the record did not show that he and his counsel were given a "reasonable opportunity" to cope with the testimony of the psychiatrist by showing that petitioner was not of unsound mind at the time of the offenses. The dissenting judges would also have affirmed on the ground that Congress, in imposing continued restraint under Section 24-301(e) upon one acquitted by reason of insanity until he is no longer "dangerous", was concerned only with persons (unlike petitioner) who engaged in unlawful conduct of a violent character.

ARGUMENT

The determination made below, concurred in by six judges of the court of appeals, was upon a matter of peculiarly local concern, involving the procedure followed by the Municipal Court under the special statutes and rules governing criminal insanity in the District of Columbia. As this Court stated in *Fisher v. United States*, 328 U.S. 463, 476:

Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed.

In particular, this Court has for many years left to the Court of Appeals for the District and to Congress the formulation and overseeing of the rules controlling the insanity defense in the District of Columbia courts. There is no adequate reason to depart from that practice in the present case.

The underlying problem in this case arises out of the purported inversion of the roles of the prosecution and defense when a court rejects a guilty plea, or refuses to allow a previous plea of not guilty to be withdrawn, and receives evidence at the trial with respect to the defendant's mental state at the time of the offense. In the ordinary case, it is the defendant who invokes the insanity defense. The usual presumption of sanity is rebutted once the defendant introduces some evidence indicating that he suffered from a mental disease or defect at the time of the crime. Once sanity is in issue, the prosecution in the federal courts has the burden of proving beyond a reasonable doubt that the defendant was sane (*Davis v. United States*, 160 U.S. 469, 488) by establishing (in the District of Columbia) either that defendant had no mental disease or defect or that the crime was not the product of the mental illness (e.g., *Carter v. United States*, 252 F. 2d 608, 618 (C.A.D.C.); *Wright v. United States*, 250 F. 2d 4, 7 (C.A.D.C.)). If the defendant is found innocent by reason of insanity, he is then automatically committed to a mental hospital (D.C. Code, Section 24-301(d)), there to remain until it is adjudicated that he has "recovered his

sanity and will not in the reasonable future be dangerous to himself or others" (D.C. Code, Section 24-301(e)).

In the present case the information contained in the medical reports concerning petitioner's competency to stand trial constituted that modicum of evidence necessary to shift the burden to the government, in order to obtain a conviction, to prove his sanity beyond a reasonable doubt. Petitioner, however, desired to plead guilty and to be sentenced, and therefore asserted that he was sane at the time of the offense. The prosecution, on the other hand, reversing its usual role, did not seek a conviction but took the position that the accused was suffering from a mental disease, that the crime was a product of that disease, and that therefore defendant was insane at the time of the offense. Since the prosecution did not seek a conviction, it did not attempt to prove sanity; rather, petitioner had the burden to prove sanity beyond a reasonable doubt if he wished to avoid automatic commitment under the District of Columbia statute. Without any psychiatric witnesses testifying as to his sanity, the evidence of insanity presented in the medical reports and in the testimony of the psychiatrist who examined petitioner was sufficient to raise a reasonable doubt as to his sanity, and therefore he was found innocent by reason of insanity and automatically committed to St. Elizabeths. See, generally, Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L.J. 905, 938-940 (1961).

Despite the fact that in the present case it was the prosecution which sought to establish petitioner's in-

nocence by reason of insanity and the defense which sought to establish guilt, we submit that no error, much less "egregious error", was committed by the court of appeals.

1. Rule 9 of the Municipal Court Criminal Rules provides that "[t]he Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. . . ." The court of appeals correctly held that, under Rule 9, the Municipal Court may, in its discretion, refuse to accept a guilty plea. Petitioner, on the other hand, incorrectly contends that under this rule the Municipal Court may refuse to accept a guilty plea only when it is in doubt as to whether "the plea is made voluntarily with understanding of the nature of the charge" (Pet. 23, 24).

Petitioner's construction does violence to the language of the rule by rendering superfluous the permissive clause, "[t]he Court may refuse to accept a plea of guilty." Under the mandatory clause, the court must refuse to accept a guilty plea which is not "made voluntarily and with understanding of the nature of the charge." Under the permissive clause, the court has general discretion to reject a guilty plea in the interests of justice. The rule is subject to no other reasonable interpretation.*

* Rule 9 is an exact replica of Rule 11 of the Federal Rules of Criminal Procedure. In discussing Rule 11, the Advisory Committee on the Federal Rules stated in its *Second Prelimi-*

Since a trial judge has discretion under Rule 9 to refuse to accept a plea of guilty, *a fortiori* he may refuse to permit a defendant to withdraw a previously entered not-guilty plea. As the Court of Appeals for the District of Columbia Circuit declared in *Tomlinson v. United States*, 93 F. 2d 652, 654 (C.A.D.C.), certiorari denied, 303 U.S. 646, "An application by a defendant to change his plea [from not guilty to guilty] is addressed to the sound discretion of the court, and the action of the court will not be disturbed, unless there has been an abuse of that discretion."

2. The court of appeals properly held that the trial judge did not abuse his discretion in refusing to accept the guilty plea here. The courts are entitled to take cognizance of evidence of insanity from whichever side it is adduced. *Davis v. United States*, 160 U.S. 469, 487-488.³ Confronted with an unequivocal

Draft of the Federal Rules of Criminal Procedure 43 (1944):

"* * * That a defendant may plead guilty, and that the court may refuse or delay acceptance of the plea, is in accordance with the common law as followed in the federal courts. See *Hallinger v. Davis*, 146 U.S. 314, 318 (1892); *United States v. Trinder*, 1 F. Supp. 659 (D. Mont. 1932). See also 4 Blackstone, *Commentaries* (1769) * * 329, 332; and 1 Chitty, *Criminal Law* (5th Am. ed. 1847) * * 422, 434, 471." (Emphasis added.)

³ This Court said in *Davis* that "[g]iving to the prosecution, where the defence is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt" (160 U.S. at 487-488 (emphasis added)).

cal opinion in the hospital report of December 28 that petitioner was of unsound mind at the time of the offenses charged,⁴ and that the offenses were the product of this mental illness, the trial court properly concluded that criminal punishment should not be imposed without further inquiry into the question whether petitioner was criminally responsible for his acts.

Acceptance of petitioner's guilty pleas would have resulted in the imposition of punishment notwithstanding clear evidence that petitioner was not responsible. A trial judge could properly conclude that to overlook such evidence would be to ignore the very basis of our criminal jurisprudence. Beyond that, he could reasonably decide that to accept the guilty pleas would have been to disregard "society's great interest" in securing the community against repetition of petitioner's anti-social conduct (*Williams v. United States*, 250 F. 2d 49, 26 (C.A.D.C.); *Winn v. United States*, 270 F. 2d 326, 327 (C.A.D.C.)) and in rehabilitating and restoring him to usefulness in the community (see C.A.D.C. slip op., p. 9; *Carter v. United States*, 283 F. 2d 200, 203 (C.A.D.C.)).⁵ The

⁴ Petitioner does not dispute that the examination to determine his competency to stand trial properly included an inquiry into his mental condition at the time the offenses were committed. See *Winn v. United States*, 270 F. 2d 326 (C.A.D.C.); *Calloway v. United States*, 270 F. 2d 334 (C.A.D.C.).

⁵ Petitioner contends that "the sole justification for the automatic commitment law in case of an acquittal by reason of insanity is that the individual, who was not legally responsible for his criminal acts, will receive treatment and rehabilitation"

judge could also properly consider that the acceptance of the pleas of guilty would have branded with a criminal record one who, as the court of appeals noted, had never before been convicted of a criminal offense and had served honorably as a commissioned officer in the armed forces (C.A.D.C., slip op., p. 8). Under such circumstances, the trial judge plainly did not abuse his discretion in refusing to permit petitioner to withdraw his pleas of not guilty and to substitute guilty pleas.*

3. There is no warrant for petitioner's contention (Pet. 20) that Section 24-301(d), which requires the commitment of "any person tried upon an indictment or information for an offense" who "is acquitted solely on the ground that he was insane at the time of

(Pet. 21), and complains that facilities at St. Elizabeths are inadequate for this purpose (Pet. 10-13, 21). Not only was this contention not made in the habeas corpus petition, but it is also without legal merit. The adequacy of the conditions at St. Elizabeths Hospital is not a proper subject for judicial notice, but rather, in a proper case, for expert and lay testimony. Petitioner also is mistaken in asserting that the "sole justification" for the automatic commitment law is that the defendant will receive treatment. An equal, if not primary, justification is that the public safety requires that a defendant acquitted by reason of insanity be hospitalized until reasonable assurance can be given that he will not be dangerous. H. Rep. No. 892, 84th Cong., 1st Sess., p. 3; S. Rep. No. 1170, 84th Cong., 1st Sess., p. 3; see *infra*, p. 13.

* Since an indication of insanity at the time of the offense is a "fair and just" reason (*Kercheval v. United States*, 274 U.S. 220, 224) for granting a defendant's motion for leave to withdraw a plea of guilty prior to imposition of sentence (*Gearhart v. United States*, 273 F. 2d 499 (C.A.D.C.)), it follows that evidence of insanity is a "fair and just" reason for refusing to permit a plea of guilty.

its commission," applies only to defendants who affirmatively raise the insanity defense. The words of the statute neither expressly nor impliedly contain such a restriction. The committee reports on the bill which became Section 24-301, moreover, both state that the purpose of subsection (d) was to amend existing law so as "[t]o provide that in every case where an accused is found not guilty of a crime solely by reason of insanity he shall be confined in a hospital for the mentally ill. This is designed to protect the public against the immediate unconditional release of accused persons who have been found not responsible for a crime solely by reason of insanity." H. Rep. No. 892, 84th Cong., 1st Sess., p. 3; S. Rep. No. 1170, 84th Cong., 1st Sess., p. 3 (emphasis added). Similarly, in *Ragsdale v. Overholser*, 281 F. 2d 943, 947 (C.A. D.C.), the court of appeals stated that the mandatory commitment provision "has two purposes: (1) to protect the public and the subject; (2) to afford a place and a procedure to rehabilitate and restore the subject as to whom the standards of our society and the rules of law do not permit punishment or accountability." The statutory scheme would be ill served by creating an exception in the case of a defendant who does not plead insanity, but who nevertheless is not responsible for his offense.⁷

⁷ Neither in his habeas corpus petition, nor in his petition for certiorari, does petitioner take the position—adopted by Judge Fahy in his dissent below—that Congress in Section 24-301(e) is not concerned with persons who have engaged in non-violent conduct. See *Overholser v. Russell*, 283 F. 2d 195 (C.A.D.C.), where this contention is rejected.

4. Finally, under the circumstances of the present case, there can be no constitutional objection to the trial proceedings or to Section 24-301.

a. Petitioner makes certain objections to the procedure allegedly followed in the trial court after that court refused to permit petitioner to substitute pleas of guilty for his pleas of not guilty. He alleges (Pet. 16) that the trial judge conducted a hearing "principally addressed to the question of whether petitioner should be committed to a mental institution" and "denied to petitioner the rudimentary rights associated with any official hearing aimed at the control of the activities of the citizen." These allegations were not made in the habeas corpus petition, however; nor is there any evidence in the record to support them.^{*} Since there is a "strong presumption of constitutional regularity in state judicial proceedings" (*Darr v. Burford*, 339 U.S. 200, 218; see *Hawk v. Olson*, 336 U.S. 271, 279; *Walker v. Johnston*, 312 U.S. 275, 286), the court of appeals correctly held that it was bound by that presumption in the absence of a showing that the judgment was so defective as to be vulnerable to collateral attack (C.A.D.C., slip op., p. 11).

b. Petitioner also contends that he "lacked adequate opportunity to test or refute the psychiatric evidence presented against him" (Pet. 17). Again,

^{*} No reporter was present at the Municipal Court proceedings. It does not appear that petitioner, who had the right to request the court to use an official reporter (see Municipal Court Criminal Rule 36; Municipal Court Civil Rule 82(b)), ever made such a request.

he failed to make this allegation in the habeas corpus petition, and no evidence in the record supports the contention. Moreover, it is settled law that petitioner has no constitutional right to procure independent psychiatric testimony at public expense. See *Smith v. Baldi*, 344 U.S. 561, 568; *McGarty v. O'Brien*, 188 F. 2d 151, 155 (C.A. 1), certiorari denied, 341 U.S. 928.*

c. Petitioner's argument that the refusal of a trial judge to accept a plea of guilty tendered, upon the advice of his lawyer, by a defendant competent to stand-trial is a denial of the effective assistance of counsel (Pet. 22) also does not bear scrutiny. It is not the court's refusal to permit the consummation of a lawyer's advice to forego an insanity defense, but the inadequacy of that advice itself, which gives rise to questions of ineffective assistance of counsel. Cf. *Smith v. Baldi*, *supra*, 344 U.S. at 566, 567; *Plummer v. United States*, 260 F. 2d 729 (C.A.D.C.); *Clark v. United States*, 259 F. 2d 184 (C.A.D.C.). See also *Tatum v. United States*, 190 F. 2d 612, 618 (C.A.D.C.). A court does not render a counsel's assistance ineffective by rejecting the proposition he tenders.

d. Petitioner further insists that he "lacked formal notice as to what he was called upon to defend him-

* In a habeas corpus proceeding to establish his eligibility for release, however, petitioner would be able to secure the expert testimony of members of the Commission on Mental Health. See *Curry v. Overholser*, 287 F. 2d 137, 140 (C.A. D.C.); *Overholser v. DeMarcos*, 149 F. 2d 23 (C.A.D.C.), certiorari denied, 325 U.S. 889; *DeMarcos v. Overholser*, 137 F. 2d 698 (C.A.D.C.), certiorari denied, 320 U.S. 786.

self against—viz, suspicion of insanity” (Pet. 17). But such a characterization of what transpired in the trial court is wholly inaccurate. Petitioner was charged not with insanity, but with cashing bad checks. Since evidence came to the attention of the court that the accused was of unsound mind at the time of the commission of the offenses, it was incumbent upon the court to resolve, not ignore, the issue of insanity, and to take testimony from whatever sources were available. Petitioner’s argument supposes that the criminal trial in the Municipal Court was actually converted into a lunacy proceeding. But this overlooks the fact that a commitment under Section 24-301 is not comparable to a civil commitment under D.C. Code, Section 21-306, *et seq.* The commission of acts forbidden by law placed petitioner in an entirely different category from one who is the subject of a civil commitment proceeding. As the court stated in *Overholser v. Leach*, 257 F. 2d 667, 669 (C.A.D.C.), certiorari denied, 359 U.S. 1013:

The test of this statute [Section 24-301] is not whether a particular individual, engaged in the ordinary pursuits of life, is committable to a mental institution under the law governing civil commitments. Cf. *Overholser v. Williams*, 1958, 102 U.S. App. D.C. 248, 252 F. 2d 629. Those laws do not apply here. This statute applies to an exceptional class of people—people who have committed acts forbidden by law, who have obtained verdicts of “not guilty by reason of insanity,” and who have been committed to a mental institution pursuant to the Code [footnote omitted]. People in that cate-

gory are treated by Congress in a different fashion from persons who have somewhat similar mental conditions, but who have not committed offenses or obtained verdicts of not guilty by reason of insanity at criminal trials.

* * *

Certainly, Congress has the constitutional power, in prescribing procedures, to distinguish between ordinary lunacy proceedings and criminal proceedings in which the defense of insanity is raised.

e. Petitioner also maintains that Section 24-301 does not meet the standards of due process because it permits commitment without a judicial finding of present insanity (Pet. 19, 20), even though the trier of fact has only a reasonable doubt as to the defendant's sanity at the time of the offense (Pet. 17). But, as the court of appeals held in *Ragsdale v. Overholser*, *supra*, 281 F. 2d at 948, there is a "rational connection between the known evidence as to * * * [defendant's] mental disease and the statute's mandatory commitment provision."¹⁰ The court there pointed out (*id.* at 948, 949) (1) that implicit in a verdict of not guilty by reason of insanity is the conclusion that the defendant committed the offense

¹⁰ Judge Fahy, concurring in *Ragsdale* (281 F. 2d at 950), agreed that "there is a rational relationship between mandatory commitment under section 24-301 and an acquittal by reason of insanity", and that "it is not undue process of law for society, in seeking a solution of the problem with which the legislation copes, to use such a provision as section 24-301, notwithstanding there is no finding of insanity, but only a doubt with respect to sanity, when section 24-301 comes into operation. See *Greenwood v. United States*, 350 U.S. 366 * * *."

charged," and that there is a rational basis for the belief that he suffered from a mental disorder of which the offense was a product; (2) that a hearing immediately following the verdict to determine the defendant's then mental condition would be meaningless for lack of a reasonable opportunity for psychiatrists to subject him to observation and examination and to report their findings; (3) that it is not unreasonable to refuse to permit the defendant to remain at large while psychiatrists are attempting to determine whether he is dangerous, for a premature release could lead to the commission of new criminal acts; (4) that the defendant may judicially test the legality of his confinement by a habeas corpus proceeding at which he is free to demonstrate by evidence that he has recovered to the point where he will not be dangerous to himself or others (see *Greenwood v. United States*, 350 U.S. 366, 375);¹¹ and (5) that placing upon a defendant who has committed criminal acts the burden of establishing his eligibility for release violates no constitutional guarantee.

Furthermore, even if there might have been merit to petitioner's argument had there been conflicting evidence on the issue of insanity at the trial, the conduct of the present case did not constitute error, much less

¹¹ Note the corresponding Scottish terminology "guilty but insane." *Report, Royal Commission on Capital Punishment*, 1949-1953 (Cmd. 8932), p. 157.

¹² See also *Tatem v. United States*, 275 F. 2d 894 (C.A.D.C.); *Lewis v. Overholser*, 274 F. 2d 592 (C.A.D.C.); *Overholser v. Leach*, 257 F. 2d 667 (C.A.D.C.), certiorari denied, 359 U.S. 1013; *Stewart v. Overholser*, 186 F. 2d 339 (C.A.D.C.).

"egregious error." The sole psychiatric testimony was to the effect that petitioner was mentally ill and that the crimes with which petitioner had been charged were the products of that mental illness (R. 13, 20). Thus, even if the automatic commitment law should apply only where the defendant is proven insane, that burden was carried in this case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

BURKE MARSHALL,
Assistant Attorney General.

RICHARD J. MEDALIE,
Assistant to the Solicitor General.

HAROLD H. GREENE,
DAVID RUBIN,
Attorneys.

JUNE 1961.

APPENDIX

Section 22-1410 of the D.C. Code (1951) provides:

Making, drawing, or uttering check, draft, or order with intent to defraud—Proof of intent—"Credit" defined.

Any person within the District of Columbia, who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than \$1,000, or both. As against the maker or drawer thereof the making, drawing, uttering or delivering by such maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in its possession or control, shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within five days after receiving notice in person, or writing, that such draft or order has not been paid. The word "credit," as used herein, shall be construed to mean arrangement or understanding, express or implied, with the bank or other depository for the payment of such check, draft, or order.

Section 24-301 of the D.C. Code (Supp. VIII, 1960) provides:

Commitment of persons of unsound mind to the District of Columbia General Hospital—Certification to the Court—Acquittal by jury on grounds of insanity—Confinement in a mental institution—Conditions for release after confinement—Conditional release—Expenses—Writ of habeas corpus—Inconsistent provisions of Federal Statutes superseded.

(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a

judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial.

(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous

to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released upon supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional

release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

(f) When an accused person shall be acquitted solely on the ground of insanity and ordered confined in a hospital for the mentally ill, such person and his estate shall be charged with the expense of his support in such hospital.

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

(h) The provisions of this section shall supersede in the District of Columbia the provisions of any Federal statutes or parts thereof inconsistent with this section.

Rule 9, Municipal Court Criminal Rules, provides:

Pleas.—A defendant may plead not guilty, guilty or, with the consent of the Court *nolo contendere*. The Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED

OCT 25 1961

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH

WINFRED OVERHOLSER, SUPERINTENDENT, ST. ELIZABETH'S HOSPITAL, WASHINGTON, D. C.

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE AMERICAN CIVIL LIBERTIES
UNION, AS AMICUS CURIAE**

FRANCIS M. SHEA,
734 Fifteenth St., N.W.
Washington, D.C.

LAWRENCE SPEISER,
1612 I St., N.W.
Washington, D.C.
Attorneys for Amicus Curiae.

INDEX

	Page
Interest of amicus curiae	1
Questions presented	7
Constitutional and statutory provisions involved	8
Statement	8
Summary of Argument	12
Argument	19
I. Statutory background	19
II. Petitioner is entitled to his release because the statutory provisions under which he is being detained, as construed by the Court of Appeals, are invalid on their face	22
A. Section 301(d), as construed by the Court of Appeals, is unconstitutional on its face because it applies to every case where there is an acquittal on grounds of insanity, no matter how trivial the offense charged, and under these circumstances it provides insufficient safeguards to assure that commitment is justified	24
B. Section 301(e), as construed by the Court of Appeals, is unconstitutional because of the onerous burden of proof it imposes upon the person seeking release	34
C. Section 301(e), as construed by the Court of Appeals, is unconstitutional because it requires a showing of freedom from "mental abnormality"	35
III. Petitioner is entitled to his release because the statutory provisions under which he is being detained are invalid as applied to him	40
A. The invalidity of petitioner's confinement is accentuated by the fact that the insanity issue was raised at his trial over his objection	40

	Page
B. The invalidity of petitioner's confinement is also accentuated by the fact that the crime with which he was charged was a misdemeanor and did not involve violence	42
IV. Non-constitutional grounds for reversing the judgment below	43
A. The trial judge erred in refusing to accept petitioner's guilty plea	43
1. The provision governing entry of guilty pleas binds the court to accept such pleas if made voluntarily and with knowledge of the consequences	43
2. Assuming <i>arguendo</i> that a judge may under some circumstances refuse to accept a guilty plea even though made voluntarily and with knowledge of consequences, this is not such a case	45
B. The statute should be construed not to authorize commitment under the circumstances of this case	50
1. The provisions are inapplicable where the defendant does not raise the insanity defense or at any rate where he wishes to plead guilty	50
2. The provisions are inapplicable where the crime charged is a non-violent misdemeanor	54
V. Other constitutional grounds for reversing the judgment	56
A. Psychiatric evidence at Government expense should have been made available to petitioner	56
B. Petitioner was deprived of adequate notice	57
C. Petitioner was deprived of the right to the effective assistance of counsel guaranteed by the Sixth Amendment	58

INDEX

iii

Conclusion	Page
Appendix	60
	61

CITATIONS

Cases:

<i>Askins v. United States</i> , 231 F.2d 741	24
<i>Bailey v. State</i> , 210 Ga. 52, 77 S.E. 2d 511	33
<i>Barry v. Hall</i> , 98 F.2d 222	28
<i>Blackston v. State</i> , 209 Ga. 160, 71 S.E. 2d 221	32
<i>Bolling v. Sharpe</i> , 347 U.S. 497	13, 30
<i>Bonfanti v. State</i> , 2 Minn. 99	41
<i>Boyd v. The People</i> , 108 Colo. 280, 116 P.2d 193	16, 48
<i>In re Boyett</i> , 136 N.C. 415, 48 S.E. 789	33
<i>Brown v. Urquhart</i> , 139 Fed. 846	33
<i>In re William M. Bryant</i> , 14 D.C. (3 Mackey) 489	28
<i>Burns v. Ohio</i> , 360 U.S. 252	18, 56
<i>Carroll v. State</i> , 204 Ga. 510, 50 S.E. 2d 330	32
<i>Carter v. United States</i> , 252 F.2d 608	21
<i>Catlin v. United States</i> , 251 F.2d 368	7
<i>Ex parte Clark</i> , 86 Kan. 539, 121 Pac. 492	32
<i>Commonwealth v. Baginski</i> , 85 Pa. Super. 47	41
<i>Commonwealth ex rel. Bickel v. Bennett</i> , 15 Wkly. Notes Cas. 515, 18 Phila. 432	41
<i>Commonwealth v. Curtis</i> , 318 Mass. 584, 63 N.E. 2d 341	48
<i>Contee v. United States</i> , 215 F.2d 324	19
<i>Curry v. Overholser</i> , 287 F.2d 137	37
<i>Davis v. United States</i> , 160 U.S. 469	20, 26
<i>Dennis v. United States</i> , 341 U.S. 494	28
<i>Douglas v. United States</i> , 239 F.2d 52	21, 24
<i>Driscoll v. Overholser</i> (Mun. Ct., unreported)	59
<i>Durham v. United States</i> , 237 F.2d 760	25
<i>Durham v. United States</i> , 214 F.2d 862	2, 13, 24
<i>Eagle v. Peterson</i> , 136 Ark. 72, 206 S.W. 55	27
<i>Ellis v. United States</i> , 356 U.S. 674	18, 56
<i>Eskridge v. Washington Prison Bd.</i> , 357 U.S. 214	18, 56

	Page
<i>Farley v. United States</i> , 354 U.S. 521	18, 56
<i>Fielding v. United States</i> , 251 F.2d 878	24
<i>Fogus v. United States</i> , 34 F.2d 97	44, 45
<i>Fugate v. Walker</i> , 204 Ky. 767, 265 S.W. 331	27
<i>Gleason v. West Boylston</i> , 136 Mass. 489	33
<i>Greenwood v. United States</i> , 350 U.S. 366	32
<i>Griffin v. Illinois</i> , 351 U.S. 12	18, 56
<i>Guiteau's Case</i> , 10 Fed. 161	2
<i>Gunther v. United States</i> , 215 F.2d 493	19
<i>Hopps v. People</i> , 31 Ill. 385	26
<i>Hough v. United States</i> , 271 F.2d 458	13, 26
<i>Howard v. United States</i> , 229 F.2d 602, <i>rev'd on rehearing en banc</i> , 232 F. 2d 274	22
<i>Isaac v. United States</i> , 284 F.2d 168	21
<i>Johnson v. United States</i> , 352 U.S. 565	56
<i>Johnson v. Zerbst</i> , 304 U.S. 458	41
<i>In re Lambert</i> , 134 Cal. 626, 66 Pac. 851	29
<i>Leland v. Oregon</i> , 343 U.S. 790	41
<i>Lewis v. Overholser</i> , 274 F.2d 592	21
<i>Long v. State</i> , 38 Ga. 491	33
<i>Lyles v. United States</i> , 254 F.2d 725, <i>cert. denied</i> , 356 U.S. 961	7, 21
<i>M'Naghten's Case</i> , 10 Cl. & Fin. 200	2
<i>Newton v. Commonwealth</i> , 333 Mass. 523, 131 N.E. 2d 749	48
<i>Overholser v. Leach</i> , 257 F.2d 667	14, 21, 34, 36
<i>Overholser v. Leach</i> (unreported opinion)	37
<i>Overholser v. O'Beirne</i> , — F. 2d —, 17, 21, 26, 36, 37, 38, 51, 55	
<i>Overholser v. Russell</i> , 283 F. 2d 195	37, 42, 55
<i>People v. Dubina</i> , 304 Mich. 363, 8 N.W. 2d 99, <i>cert. denied</i> , 319 U.S. 766	32
<i>People v. Garbutt</i> , 17 Mich. 9	26
<i>People ex rel. Peabody v. Chanler</i> , 133 App. Div. 159, 117 N.Y. Supp. 322	41
<i>People ex rel. Sullivan v. Wendel</i> , 33 Misc. 496, 68 N.Y. Supp. 948	29
<i>Pollard v. United States</i> , 282 F.2d 450, 285 F.2d 81	22
<i>Powell v. Alabama</i> , 287 U.S. 45	58

	Page
<i>Ragsdale v. Overholser</i> , 281 F. 2d 943, 13, 14, 21, 30, 33, 34, 37, 38, 40, 43, 53, 55	
<i>Rex v. Oliver</i> , 6 Cr. App. 19	16, 49
<i>In re Rosenfeld</i> , 157 F.Supp. 18	36
<i>Sauer v. United States</i> , 241 F.2d 640, <i>cert. de-</i> <i>nied</i> , 354 U.S. 940	7, 22
<i>Schenck v. United States</i> , 249 U.S. 47	28
<i>Shelton v. Tucker</i> , 364 U.S. 479	14, 33
<i>Sinclair v. State</i> , 132 So. 581	41
<i>Smith v. Bennett</i> , 365 U.S. 708	18, 56
<i>Smith v. California</i> , 361 U.S. 147	35, 41
<i>Smith v. United States</i> , 36 F.2d 548	2
<i>Speiser v. Randall</i> , 357 U.S. 513	14, 35
<i>State v. Bartlett</i> , 43 N.H. 224	26
<i>State v. Billings</i> , 55 Minn. 467, 57 N.W. 794	29
<i>State v. Clancy</i> , 38 Nev. 181, 147 Pac. 449	32
<i>State v. Colley</i> , 78 Ohio App. 425, 65 N.E. 2d 159	32
<i>State v. Finn</i> , 257 Minn. 138, 100 N.W. 2d 508	32
<i>State ex rel. Fuller v. Mullinar</i> , 364 Mo. 858, 269 S.W. 2d 72	29
<i>State v. Jones</i> , 50 N.H. 369	2
<i>State v. Lange</i> , 168 La. 967, 123 So. 642	41
<i>State v. Pike</i> , 49 N.H. 399	2
<i>State v. Strasburg</i> , 60 Wash. 106, 110 Pac. 1020	41
<i>Stewart v. Overholser</i> , 186 F.2d 339	21
<i>Tatum v. United States</i> , 190 F.2d 612	19
<i>Taylor v. United States</i> , 222 F.2d 398	6, 19
<i>Tot v. United States</i> , 319 U.S. 463	13, 26
<i>Trial of Edward Arnold</i> , 16 How. State Tr. 695	26
<i>Underwood v. People</i> , 32 Mich. 1	33
<i>United States v. Currens</i> , 290 F.2d 751	3, 5, 22
<i>United States v. Kloman</i> , Crim. No. 383-58, Feb. 15, 1960	48
<i>Wear v. United States</i> , 218 F.2d 24	19
<i>Williams v. Overholser</i> , 259 F.2d 175, 162 F. Supp. 514, 165 F.Supp. 879, 147 A.2d 773	25, 43, 48
<i>Wright v. United States</i> , 215 F.2d 498	19
<i>Yankulov v. Bushong</i> , 80 Ohio App. 497, 77 N.E. 2d 88	33

Statutes:	Page
Colo. Rev. Stat. Ann. 39-8-4 (Supp. 1960)	31, 50
D.C. Code (Supp. VIII, 1960):	
Sec. 24-301(a)	9, 24, 25, 59
Sec. 24-301(d)	7, 8, 11, 12, 14, 17, 19, 20, 22, 24, 30, 31, 32, 40, 42, 43, 50, 51, 53, 55
Sec. 24-301(e)	7, 8, 11, 14, 17, 19, 20, 22, 34, 35, 39, 40, 42, 43, 50, 52, 53, 54
D.C. Code (1951), sec. 21-315	21
D.C. Code (1951), sec. 21-306 <i>et seq.</i>	13, 28, 35
D.C. Code (1951), sec. 24-301	19
D.C. Code (1951), sec. 22-1410	8, 46
Ga. Code Ann. 27-1503 (1953)	31
40 Geo. 3, c. 94 (1800)	50
Ill. Rev. Crim. Code 6-2 (1961)	5
Kan. Gen. Stat. Ann. 62-1532 (1949)	31, 32
Mass. Ann. Laws, ch. 123, § 101; ch. 277, § 16; ch. 278, § 13	31
Mich. Stat. Ann. 28.933(3) (1954)	31
Minn. Stat. Ann. 631.19 (as amended, Laws 1957, ch. 196, § 1)	31
Minn. Stat. Ann. 610.10	32
Neb. Rev. Stat. Ann. 29.2203 (1943)	31
Nev. Rev. Stat. 175.445 (1955)	31
N.Y. Sess. Laws 1960, ch. 550, §§ 1-3	31
Ohio Rev. Code 2945.39 (Baldwin 1953)	31
Vt. Stat. Ann. 13-4801 (1958)	5
V.I. Code Ann. 5-3637 (1957)	31
14-14	3
Wis. Stat. Ann. 957.11 (1958)	31
Miscellaneous:	
ABA Special Committee on Rights of the Mentally Ill, Report, 72 A.B.A. Rep. 295 (1947)	29
A.L.I. Model Penal Code, sec. 4.01 (Tent. Draft No. 4, 1955)	5
American Psychiatric Association, Diagnostic and Statistical Manual, Mental Disorders (Mental Hospital Service)	36

	Page
Cardozo, <i>What Medicine Can Do For Law</i> , from Law and Literature and Other Essays and Addresses (1931)	4
Cleckley, <i>The Mask of Sanity</i> (1955)	38
Comment, <i>Releasing Criminal Defendants Ac- quitted and Committed Because of Insanity: The Need for Balanced Administration</i> , 68 Yale L.J. 293 (1958)	31, 38
Douglas, <i>The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists</i> , 41 Iowa L.Rev. 485 (1956)	5
Douglas, <i>Vagrancy and Arrest on Suspicion</i> , 70 Yale L.J. 1 (1960)	47
English and English, <i>Comprehensive Dictionary of Psychological and Psychoanalytical Terms</i>	36
Federal Rules of Criminal Procedure, Rule 11	15, 44
Foote, <i>Vagrancy-Type Law and its Administra- tion</i> , 104 U. of Pa. L. Rev. 603 (1956)	47
Goldstein and Katz, <i>Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of In- sanity</i> , 70 Yale L.J. 225 (1960)	3, 39, 41, 49
H.R. 7052, 87th Cong., 1st Sess. (1961)	5
H. Rep. No. 892, 84th Cong., 1st Sess., 17, 18; 19, 27, 52, 55	
Hall, <i>Psychiatry and Criminal Responsibility</i> , 65 Yale L.J. 761 (1956)	3
Halleck, <i>The Insanity Defense in the District of Columbia—A Legal Lorelei</i> , 49 Geo. L.J. 294 (1960)	3, 36, 48
<i>Insanity and the Criminal Law—A Critique of Durham v. United States</i> , 22 U. Chi. L. Rev. 317 (1955)	3
Joint Appendix, <i>Curry v. Overholser</i> , 287 F.2d 137	37
Kimbrell, <i>Compulsory Commitment Following a Successful Insanity Defense</i> , to be published in 56 Nw. U.L. Rev., No. 3 (July-August, 1961)	33, 48
Krash, <i>The Durham Rule and Judicial Adminis- tration of the Insanity Defense in the District of Columbia</i> , 70 Yale L.J. 905 (1961)	2, 3, 37, 39, 49

Letters on file with the Northwestern University
Law Review from:

Page

J. Berkeley Gordon, M.D.	25
Rev. Vincent Tikuisis	25
William J. T. Cody, M.D.	25
Municipal Court Criminal Rules, Rule 9	7, 15, 48, 44
Note, <i>Use of Vagrancy-Type Laws for the Arrest and Detention of Suspicious Persons</i> , 59 Yale L.J. 1351 (1950)	47
Notes of Advisory Committee on Federal Rules, 18 U.S.C.A., Rules 1 to 31, p. 298	44
Reid, <i>Understanding the New Hampshire Doc- trine of Criminal Insanity</i> , 69 Yale L.J. 367 (1960)	3
Report, Royal Commission on Capital Punish- ment (1953), p. 102	5
Sec. 443	16, 49
S.Rep. No. 1170, 84th Cong., 1st Sess.	19
Smoot, <i>The Law of Insanity</i> (1929)	41
Sobeloff, <i>Insanity and the Criminal Law: From M'Naghten to Durham and Beyond</i> , 41 A.B. A.J. 793 (1955)	3
Statement of the American Bar Association Spe- cial Committee on the Rights of the Mentally Ill, 72 A.B.A. Rep. 295 (1947)	29
Supreme Court Rules, Rule 40(1)(d)(2)	19, 59
Szasz, <i>Psychiatry, Ethics, and the Criminal Law</i> , 58 Colum. L. Rev. 183 (1958)	3
The Mentally Disabled and the Law (ed. Lind- man and McIntyre, 1961)	32
Washington Post, Oct. 30, 1960, p. G11	59
Webster's Unabridged New International Dic- tionary (2d ed.)	36
Weihofen, <i>Mental Disorder as a Criminal De- fense</i> (1954)	38
Weihofen, <i>The 'Test' of Criminal Responsibil- ity: Recent Developments</i> , 172 Int'l Record of Medicine 638 (1959)	3
White, <i>The Abnormal Personality</i> (2d ed. 1956)	38

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH

v.

WINFRED OVERHOLSER, SUPERINTENDENT, ST. ELIZABETHS HOSPITAL, WASHINGTON, D. C.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR THE AMERICAN CIVIL LIBERTIES
UNION, AS AMICUS CURIAE**

Interest of Amicus Curiae

This brief is being filed pursuant to Rule 42 with the written consent of both petitioner and respondent. The American Civil Liberties Union believes that this case involves not only a serious deprivation of due process—a subject in which the amicus' interest is great—but also presents issues that are of far-reaching significance with respect to the law of criminal responsibility in the District of Columbia and in which the amicus has had an abiding concern.

In 1954, in *Durham v. United States*, 214 F.2d 862, the Court of Appeals for the District of Columbia Circuit broke dramatically with the past by adopting a new standard for determining when a defendant should be acquitted of a crime on grounds of insanity. Prior to *Durham*, the standard in the District of Columbia was the traditional M'Naghten Rule—whether the accused knew the difference between right and wrong and appreciated the nature and quality of his act—supplemented by the “irresistible impulse” corollary. See *M'Naghten's Case*, 10 Cl. & Fin. 200, 210 (H.L. 1843); *Guiteau's Case*, 10 Fed. 161, 12 D.C. (1 Mackey) 498 (1862); *Smith v. United States*, 36 F.2d 548, 549 (1929). As articulated in *Durham*, the question in the District of Columbia is now simply whether the accused's “unlawful act was the product of mental disease or mental defect.” The purpose of this innovation, as one leading student of *Durham* has expressed it, was “to reconcile the rule of responsibility with advances in medical knowledge, and to broaden the class of persons who would be treated instead of punished; more particularly, it was framed to facilitate communication between psychiatric experts and the courts which was being impeded by the pre-existing tests.” Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L.J. 905 (1961).

Apart from the State of New Hampshire, where a rule similar to *Durham* had been adopted in 1871, see *State v. Jones*, 50 N.H. 369, and also *State v. Pike*, 49 N.H. 399, 408 (1869), the District of Columbia was the first jurisdiction in the United States to abandon the ancient rules of criminal responsibility. However, in contrast to the New Hampshire insanity doctrine, which has lain “dormant—ignored, misunderstood, and generally viewed as the

peculiar eccentricity of a one-horse state,"¹ the *Durham* decision has provoked intense interest and widespread comment.² Nor has this interest been confined to academic circles. On the contrary, court after court has been urged to adopt the *Durham* rule or something akin to it,³ and the District of Columbia courts have labored diligently in working out the ramifications of *Durham*. One index to the magnitude of that task is the fact that, since 1954, the Court of Appeals has handed down more than 80 opinions dealing with various aspects of the insanity defense.⁴

Thus it is plain that the courts of the District of Columbia are engaged in a critically important pioneering effort to provide newer and more satisfactory answers to some of the most complex problems of the criminal law: the nature of criminal responsibility as it is affected by the mental illness of the defendant; the causal relation between particular mental illnesses and crime; the type of evidence relevant to establish mental illness; and the respective functions of the court and the jury in deciding these ques-

¹ Reid, *Understanding the New Hampshire Doctrine of Criminal Insanity*, 69 Yale L.J. 367 (1960).

² For a sampling of the literature in the field, see Hall, *Psychiatry and Criminal Responsibility*, 65 Yale L.J. 761 (1936); Szasz, *Psychiatry, Ethics, and the Criminal Law*, 58 Colum. L. Rev. 183 (1958); Weihofen, *The 'Test' of Criminal Responsibility: Recent Developments*, 172 Int'l Record of Medicine 638 (1959); *Insanity and the Criminal Law—A Critique of Durham v. United States*, 22 U. Chi. L. Rev. 317 (1955); Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham and Beyond*, 41 A.B.A.J. 793 (1955). And for articles particularly relevant to the issues presented in the case at bar, see Krash, *op. cit. supra*; Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei*, 49 Geo. L.J. 294 (1960); and Goldstein and Katz, *Dangerousness and Mental Illness: Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 Yale L.J. 225 (1960).

³ Most have declined the invitation. See cases cited in Krash, *op. cit. supra*, p. 906 n. 8. But see *United States v. Currens*, 200 F.2d 751 (3d Cir. 1961), and 14 V.I. Code Ann. § 14 (1957).

⁴ See Krash, *op. cit. supra*, pp. 906-907.

tions. Lest what we say in this brief leave any impression that we regard these developments in the District of Columbia as undesirable, we wish to record at the outset our view that *Durham* and the effort that has been devoted to its application constitutes one of the most heartening developments in decades in the jurisprudence of criminal law. In voicing this conviction, we are but echoing the opinions of the many distinguished persons who have questioned the wisdom of adhering to a principle of criminal responsibility that was established well over a century ago when science had hardly begun its exploration of the mysteries of the human mind.

In 1928, for example, Mr. Justice Cardozo called for a definition of insanity "that will combine efficiency with truth," and characterized the M'Naghten Rule, a "definition that palters with reality," as representing "neither good morals nor good science nor good law." Cardozo, *What Medicine Can Do For Law*, from *Law and Literature and Other Essays and Addresses* (1931), p. 108. Mr. Justice Frankfurter also expressed his disapproval of adherence to *M'Naghten* during his testimony before the Royal Commission on Capital Punishment. He stated in part:

"I do not see why the rules of law should be arrested at the state of psychological knowledge of the time when they were formulated. . . . If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think, the real situation, certainly with us . . . then I think the law serves its best interests by trying to be more honest about it. . . . They are in large measure abandoned in practice, and therefore I think the M'Naghten Rules are in large measure shams. That is a strong word, but I think the M'Naghten Rules are very difficult for

conscientious people and not difficult enough for people who say, 'We'll just juggle them.' . . . I dare to believe that we ought not to rest content with the difficulty of finding an improvement in the M'Naghten Rules. . . ." Report, Royal Commission on Capital Punishment (1953), p. 102.

See also Chief Judge Biggs' opinion for the court in *United States v. Currens*, 290 F.2d 721 (1961), where the Court of Appeals for the Third Circuit, referring to the "vast absurdity of the application of the M'Naghten Rules," *id.*, at 766, followed the lead of *Durham* in rejecting the traditional tests.⁵ And see Mr. Justice Douglas' criticism of the M'Naghten Rule and his favorable appraisal of the Durham Rule in his article, *The Durham Rule: A Meeting Ground for Lawyers and Psychiatrists*, 41 Iowa L.Rev. 485 (1956).

While the *Durham* decision represented a giant stride forward, however, it also generated a host of complicated subsidiary problems. In view of the troublesome nature of these questions with which the Court of Appeals has

⁵ The *Currens* court, however, adopted a formula that it believed would give more guidance to the jury than *Durham*: Whether the defendant "at the time of committing the prohibited act . . . as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated." *Id.*, at 774. The court said that this test was "based primarily" on the American Law Institute proposal, which reads as follows:

"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

"(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." Model Penal Code § 4.01 (Tent. Draft No. 4, 1955).

This test, with one or another variation, appears to be gaining support. See Ill. Rev. Crim. Code 6-2 (1961); Vt. Stat. Ann. 13-4801 (1958); H.R. 7052, 87th Cong., 1st Sess. (1961).

had to grapple, we believe that the decisions of the Court have generally reflected wisdom and an appropriate recognition of the necessarily tentative and experimental nature of the answers that could be given. Nonetheless, in any venture so bold and significant as this one, there is a serious risk that, at some point, not only may the courts go awry, but they may do so in a manner that sacrifices critically important elements of human freedom. Regrettably, that risk has been realized in the case at bar, and it is for that reason that this Court is called upon to mark the outer limit of the experimentation.

Moreover, while the vindication of petitioner's rights is sufficient reason for this Court to act, we believe it appropriate to note our belief that the manner in which the Court disposes of this case may well have a significant effect for good or ill upon the Durham Rule. To be sure, the issues raised in this case do not relate directly to the meaning and application of *Durham*. Rather, the question here concerns the proper role of the state with respect to a person who has been acquitted on the basis of that rule. Still, it would blink reality to deny that the standards governing commitment upon an acquittal by reason of insanity bear significantly upon the workability of the Durham Rule. If those standards are unreasonably stringent, persons who would be entitled to an acquittal by reason of insanity may be reluctant to raise the defense. On the other hand, if the standards are unreasonably lax, juries may be overly chary of acquitting defendants on grounds of insanity because of a belief that this would seriously jeopardize the security of the citizens of the District of Columbia.* Consequently, the task of

*The Court of Appeals has recognized this factor and has held that the jury should be instructed as to the consequences of an acquittal on grounds of insanity. See *Taylor v. United States*, 222 F.2d 398, 404

Congress in formulating rules of commitment and release and of the courts in interpreting and applying them is of critical importance to the integrity of the Durham Rule.

Questions Presented

In factual terms, the fundamental question in this case is whether a person charged with a non-violent misdemeanor who is represented by counsel and who wishes to enter a guilty plea may instead be acquitted on grounds of insanity and then automatically committed to and confined in a mental institution. In legal terms, the issues may be stated as follows:

1. Is the mandatory commitment provision of the D. C. Code, section 24-301(d), as it has been construed by the Court of Appeals, invalid under the Due Process Clause of the Fifth Amendment?
2. Is the provision of the D. C. Code, section 24-301(e), that governs the release of persons committed under section 24-301(d) after an acquittal by reason of insanity, as it has been construed by the Court of Appeals, invalid on its face under the Due Process Clause of the Fifth Amendment?
3. Are either or both of these provisions unconstitutional under the Due Process Clause of the Fifth Amendment as they are applied to a person charged with a non-violent misdemeanor who wishes to plead guilty?
4. Was the trial judge required by Rule 9 of the Municipi-

(1955); *Lyles v. United States*, 254 F.2d 725, 728, 734 (1957), cert. denied, 356 U.S. 961; *Catlin v. United States*, 251 F. 2d 368 (1957).

It may also be noted that some courts have been deterred from adopting the Durham Rule because of a belief that post-acquittal confinement procedures outside the District of Columbia are inadequate. See e.g., *Sauer v. United States*, 241 F.2d 640, 650 (9th Cir. 1957), cert. denied, 334 U.S. 940.

pal Court Rules to accept petitioner's plea of guilty because it was made voluntarily, with full knowledge of consequences, and with the advice of counsel?

5. Was it an abuse of discretion on the part of the trial judge to refuse to accept such a plea?

6. Should sections 24-301(d) and 301(e) be construed to be inapplicable where the accused wishes to plead guilty?

7. Should those provisions be construed to be inapplicable where the crime charged was not one of violence?

8. Under the Due Process Clause of the Fifth Amendment, should psychiatric testimony have been made available to petitioner at the expense of the Government?

9. Was petitioner deprived of notice adequate to satisfy the Due Process Clause of the Fifth Amendment that the issue of sanity was to be litigated at the trial?

10. Was petitioner deprived of the right to counsel guaranteed by the Sixth Amendment?

Statutes, Rule, and Constitutional Provisions Involved

The applicable constitutional and statutory provisions and the relevant rule of procedure are set forth in the Appendix, *infra*, pp. 61-64.

Statement

At issue in this case is the validity of petitioner's confinement in St. Elizabeth's Hospital. The circumstances relevant to this issue are as follows:

On November 6, 1959, two informations were filed against petitioner in the Municipal Court for the District of Columbia, charging him with violations of the District's Bad Check Law, D. C. Code 22-1410. (R. 22, 26). More specifically, the charge was that, on two occasions,

petitioner had drawn checks of \$50.00 knowing he did not have sufficient funds in his account to cover them, and that he had not made these checks good within five days after receiving notice that they had not been honored by his bank.

Pursuant to section 24-301(a) of the D.C. Code, see *infra*, p. 61, the Municipal Court ordered petitioner committed to the District of Columbia General Hospital for examination to determine his mental competency to stand trial. (R. 21, 25) On December 4, 1959, the Assistant Chief Psychiatrist of the Hospital reported to the court that petitioner was not competent to stand trial because he was "of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense." The psychiatrist stated that petitioner had "shown some improvement," but "recommended that he be committed to a psychiatric hospital for further care and treatment." (R. 23) The court, upon the basis of this report, ordered petitioner's commitment continued. (R. 21)

On December 28, 1959, the Assistant Chief Psychiatrist of the General Hospital sent another report to the court, stating that petitioner had "shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense." The psychiatrist went on to state that in his opinion petitioner "was suffering from a mental disease, i.e., a manic depressive psychosis, at the time of the crime charged. Such an illness would particularly affect his judgment in regard to financial matters, so that the crime charged would be a product of this mental disease." Furthermore, said the psychiatrist, petitioner was "in an early stage of recovery," and therefore it was "possible that he may have further lapses of judgment in the near future." He

concluded, "It would be advisable for him to have a period of further treatment in a psychiatric hospital." (R. 24).

The trial was held the following day. The only notation in the record regarding representation by counsel indicates that petitioner waived counsel (R. 21), but it is conceded that counsel was ultimately appointed before the trial.⁷

Prior to the trial, a not guilty plea had been entered. (R. 19) It is not clear from the record whether the court entered this plea for defendant—the most reasonable presumption since the court had doubts about petitioner's competency—or whether defendant entered it himself. In any event, it seems clear that it was entered at a time when he was, according to the government psychiatrist, incompetent to act for himself in a legal proceeding, and when he was unrepresented by counsel.

At the trial, petitioner, through his counsel, attempted to enter a plea of guilty. However, despite the fact that petitioner had been found competent to stand trial, the trial judge refused to permit the entry of this plea. (R. 19) The judge thereupon heard evidence over petitioner's objection. (R. 19) Part of the evidence submitted by the government was the testimony of a physician from General Hospital who testified that petitioner was competent to stand trial, but also that the crimes of which he was charged were the product of his mental illness. (R. 19) Petitioner offered no evidence of any kind.⁸ (R. 19) At the conclusion of the trial, the judge found petitioner not guilty by reason

⁷ Petitioner, in his brief before the Court of Appeals, represented that this delayed appointment of counsel is the practice in the Municipal Court in cases of this nature, and this representation was not denied by the Government.

⁸ The Court of Appeals stated that "it appears appellee took the stand and denied essential elements of the crimes. . . ." 288 F. 2d, at 390. We cannot, however, find support for this statement in the District Court's findings.

of insanity, and thereupon ordered him committed to St. Elizabeth's Hospital pursuant to section 24-301(d) of the D. C. Code.⁹ See p. 62, *infra*. The judge conducted no hearing and made no finding as to petitioner's then existing mental condition.

On June 13, 1960, petitioner attacked the validity of his confinement in St. Elizabeth's by filing a petition for habeas corpus in the District Court for the District of Columbia. The petition rested upon a number of grounds, among which were the following: (1) deprivation of due process by the trial court's refusal to accept petitioner's guilty plea; (2) deprivation of due process by virtue of the confinement being based solely upon reasonable doubt as to his sanity as of a previous date; (3) deprivation of due process by virtue of the onerous release standards of section 24-301(e); and (4) application of section 24-301(e) to a situation not properly within its scope, *i.e.*, a case where the defendant had not raised an insanity defense. (R. 3-6)

A hearing was held before Judge McGarraghy on June 16, 1960. (R. 12) The Court ruled in petitioner's favor, stating:

"[T]he Municipal Court lacked jurisdiction to effect such a commitment and thereby permit the government to obtain commitment of the petitioner as of unsound mind by use of a criminal proceeding in substitution for civil commitment procedures established by law; . . ." (R. 20)

On the basis of this ruling, the judge ordered that petitioner be discharged from St. Elizabeth's unless civil commitment proceedings were instituted within ten days. (R. 20)

⁹ The finding was not phrased in the language of section 301(d), which refers to an acquittal "solely" on grounds of insanity.

On appeal, the Court of Appeals, sitting *en banc*, reversed this judgment, rejecting all of petitioner's arguments. Judge Fahy, joined by Judges Edgerton and Bazelon, filed a dissenting opinion in which he said the judge's refusal to accept the guilty plea posed a "most difficult question," but one that need not be reached because in any event (1) the record disclosed too great a possibility that petitioner had not been given fair notice that the insanity issue would be litigated at the trial, and (2) the confinement provisions of the statute, properly construed, excluded the continued custody of a person without invocation of civil commitment procedures unless the crime with which he had been charged involved violence to person or perhaps to property.

Summary of Argument

While there are broad constitutional issues presented in this case, and while we believe that, if decided, they should be resolved in petitioner's favor, we also believe that the case may more appropriately be disposed of upon narrower grounds. Nonetheless, since the Court would have to reach the constitutional questions if it were to reject our argument on the non-constitutional issues, and since the latter can be weighed judiciously only in the context of the former, we address ourselves first to the constitutional questions.

- I

Section 24-301(d) of the D. C. Code, as construed by the Court of Appeals, is unconstitutional on its face. Under that provision, an acquittal on grounds of insanity results automatically in commitment to a mental institution. As this case demonstrates, the Court of Appeals has construed the statute to be applicable regardless of

the nature of the crime charged. The result is that a person charged with a non-violent misdemeanor is committed solely upon the basis of a reasonable doubt as to his mental health at a prior time—for this is all that is implied by an acquittal on grounds of insanity, *Ragsdale v. Overholser*, 281 F.2d 943, 947 (D.C. Cir. 1960)—and without any hearing or opportunity to establish his present sanity. This irrebuttable presumption of continued mental disease is so irrational as to offend the principle of *Tot v. United States*, 319 U.S. 463, 47-468 (1943); and, in the context of so serious a deprivation, the commitment procedures are so arbitrary as to offend due process. Moreover, since these procedures have no overtones of punishment, *Hough v. United States*, 271 F.2d 458, 462 (D.C. Cir. 1959), there is no adequate basis for distinguishing the acquitted defendant from the ordinary citizen. Consequently, in view of the elaborate procedural safeguards surrounding a civil commitment, D.C. Code, 21-306 *et seq.*, there is a violation of the principle of equal protection that is reflected in the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497 (1954).

We fully recognize the interest of society in protecting itself, and, moreover, we believe that the workability of the rule of *Durham v. United States*, 214 F.2d 862 (1954) (guilt turns upon whether or not the "unlawful act was the product of mental disease or mental defect") depends upon the existence of commitment procedures well calculated to secure that interest. However, there are practicable alternatives to section 301(d). For example, the trial judge could conduct a hearing and make a finding immediately after acquittal as to the desirability of commitment, based upon the trial testimony and the psychiatric report made in connection with the determination of

defendant's competency to stand trial, as well as upon whatever other evidence might be available. And the practicability of alternatives is itself relevant to the resolution of the constitutional question. *Shelton v. Tucker*, 364 U.S. 479, 488-489 (1960).

Moreover, the provision governing the release of persons committed pursuant to section 301(d), namely, section 301(e), as construed by the Court of Appeals, is also unconstitutional on its face. In order to secure his release, the individual must establish beyond a reasonable doubt that he has recovered his sanity and that he is no longer dangerous. *Ragsdale v. Overholser*, 281 F.2d 943, 947 (D.C. Cir. 1960). Thus he is committed on the basis of a reasonable doubt and cannot free himself because of a reasonable doubt, even though his crime may have been merely overtime parking. Imposition of an unreasonable burden of proof may constitute a deprivation of due process, *Speiser v. Randall*, 357 U.S. 513 (1958); and, under these circumstances, we submit that it does.

Furthermore, the invalidity of section 301(e) is accentuated by virtue of the fact that it is not sufficient that the individual prove beyond a reasonable doubt that he is not insane or even that he is not suffering from mental disease or defect. He must also prove that he is free from some less serious type of malady—in the words of the Court of Appeals, “such abnormal mental condition as would make [him] . . . dangerous to himself or the community in the reasonably foreseeable future.” *Overholser v. Leach*, 257 F.2d 667, 670 (D.C. Cir. 1958). In *Leach*, the individual was “a sociopathic personality with dyssocial outlook,” and it is well established that such individuals seldom respond to treatment. Thus this statute lays the basis for lifelong confinement in an insane asylum of a person who has not committed a felony or even a misdemeanor

of violence but who cannot convince the court beyond a reasonable doubt that he does not suffer from an "abnormal mental condition" that might make him dangerous, and that dangerousness may be merely that he might once again dump his garbage in the street to spite his neighbor.

These statutory provisions are, at any rate, plainly unconstitutional as applied to petitioner. In the first place, it cannot be argued that petitioner knowingly and willingly accepted the consequences of his acquittal on grounds of insanity, since he attempted to enter a plea of guilty. Thus, whatever weight a waiver theory might have where the defendant raises the insanity defense, this is not such a case. And in the second place, petitioner's crime was not one of violence, and consequently society's interest in protection against him is related only to property interests, not to interests of personal safety. In short, whatever might be said in justification of the statute when applied to a person who seeks and secures an acquittal in a murder or rape case on grounds of insanity cannot be said here.

IV

There are several non-constitutional grounds for reversing the judgment that would enable the Court to avoid decision of the constitutional questions.

A. First, the trial judge erred in refusing to accept the guilty plea. Rule 9 of the Municipal Court Rules, which is identical to Rule 11 of the Federal Rules of Criminal Procedure, should be construed to require the court to accept such a plea if made voluntarily and with knowledge of the consequences. While the language of the Rule is ambiguous, see *infra*, p. 64, the authorities cited in petitioner's brief establish that historically courts have regarded themselves as free to reject a tendered guilty plea

only where there was doubt as to whether the defendant was acting with full awareness. In the light of this background, the Rule's meaning becomes clear.

In any event, assuming *arguendo* that the trial judge had some discretion beyond such a situation, that discretion was abused in this case. The interest of the defendant in entering the plea was strong, in view of the grave consequences of an acquittal on grounds of insanity as compared with the relatively light sentence that would have been imposed. Under such circumstances, the state's interest in seeing that convictions are unquestionably correct cannot displace the defendant's choice, since that interest derives its greatest value from the protection it gives to the person accused, and in this case such "protection" was but an illusion. Moreover, rejection of our argument would open the door to grave abuse, for the prosecution would then be in a position, under the guise of "doing justice," to seek in misdemeanor cases a confinement that would probably exceed greatly the sentence that could be imposed; and this could be accomplished in many cases with great ease because, where the defendant seeks to avoid commitment, the roles are reversed and he must prove his sanity beyond a reasonable doubt. Acceptance of our position, on the other hand, would accord with the rule in other jurisdictions that only the accused may raise an insanity defense. *Boyd v. The People*, 108 Colo. 280, 294, 116 P.2d 193 (1941); *Rex v. Oliver*, 6 Cr. App. 19, 20 (1910); Report, Royal Commission on Capital Punishment, § 443 (1953).

B. The statutory provisions should be construed to be inapplicable either (1) where the defendant does not raise the insanity defense or wishes to plead guilty or (2) where the crime charged is a non-violent misdemeanor.

The statutory language does not expressly provide whether commitment and confinement should follow an

acquittal by reason of insanity regardless of who injects the insanity issue into the case, and hence our suggested construction may be adopted so as to reduce constitutional doubts. Moreover, it should be noted that a literal reading of the statute would not support the Government either. The statute requires that for commitment to take place, the defendant be acquitted because "he was insane," section 24-301(d), and that for release to be authorized, he have "recovered his sanity," section 24-301(e). Thus, read literally, the statute sanctions commitment and confinement only where there is a finding of insanity, and, as we have indicated, an acquittal on grounds of insanity constitutes no such finding. Thus, "if we are to interpret §24-301 more broadly than its literal meaning, we should not go so far beyond its literal meaning as to raise serious constitutional doubts." *Overholser v. O'Bierne*, — F.2d — (Oct. 19, 1961), slip op., p. 23 (dissenting opinion of Judge Edgerton). Furthermore, the legislative history supports our proposed construction. See Report of the Committee on Mental Disorder, reprinted in House Report No. 892, 84th Cong., 1st Sess., p. 13 ("where the accused has pleaded insanity as a defense" the commitment procedure is "just and reasonable"). Finally, Congress should be presumed to have legislated with knowledge of the established rule that guilty pleas knowingly tendered are to be accepted.

In the alternative, a reading of the statute that would restrict its application to situations involving crimes of violence is perfectly plausible. The wording of section 301(e), by referring to the necessity of showing that the individual will not be "dangerous" to himself or others if released, suggests such an interpretation, as the dissenting judges below pointed out. Moreover, such a construction would reduce the constitutional problems, since

society's interest in confinement would then be greater. Finally, again the legislative history affords support for our position. See Report of the Committee on Mental Disorder, reprinted in House Report No. 892, 84th Cong. 1st Sess., p. 13 (refers to the need to prevent occurrences such as those where, because of premature release, persons acquitted elsewhere on grounds of insanity had "commit[ted] some further serious crime, many of them involving rape and/or murder").

V

There are three other alternative grounds for reversing the judgment.

A. First, psychiatric evidence at Government expense should have been made available to petitioner, who was indigent, on the principle of the line of cases including *Griffin v. Illinois*, 351 U.S. 12 (1956); *Burns v. Ohio*, 360 U.S. 252 (1959); *Farley v. United States*, 354 U.S. 521 (1957), *Ellis v. United States*, 356 U.S. 674 (1958); *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958); and *Smith v. Bennett*, 365 U.S. 708 (1961).

B. Second, the record does not afford sufficient support for the usual presumption of regularity of proceedings, in that it is probable that petitioner did not receive adequate notice that the issue of insanity was to be litigated. The reason, of course, is that neither he nor his counsel had any reason to suspect that the court would decline to accept the guilty plea.

C. Finally, the record discloses that the petitioner was deprived of his right to counsel, in that no counsel was appointed for him during the important pre-trial stages of confinement and examination. While this issue was not presented in the petition for habeas corpus or in the petition for certiorari, we know of no jurisdictional bar to

the Court's considering it. See Rule 40 (1)(d)(2). Moreover, the error is not only plain, but affects constitutional rights.

ARGUMENT

I. Statutory Background

The legislation that is involved in this case was not in effect when *Durham* was decided. At that time, the pertinent District of Columbia statute provided only that the court, upon a person's acquittal by reason of insanity, had the discretion to notify the Secretary of Health, Education, and Welfare, who in turn could order hospital confinement for that person. D. C. Code, 24-301 (1951).¹⁰ In 1955, however, in the wake of *Durham* and related decisions, Congress passed legislation comprehensively regulating the procedures to be followed in the District of Columbia both before and after trial where an insanity question is involved.¹¹ 69 Stat. 609. The portions of that legislation that are involved in this case are sections 301(d) and 301(e) of the District of Columbia Code, Title 24, which govern both the commitment and the subsequent release of a person found not guilty by reason of insanity. These sections provide in pertinent part as follows:

"(d) If any person tried . . . for an offense . . . is acquitted solely on the ground that he was insane at

¹⁰ It was the customary practice of the courts to invoke this provision. See Report of the Committee on Mental Disorder, reprinted in H. Rep. No. 892, 84th Cong., 1st Sess., p. 12.

¹¹ The other decisions listed by the House and Senate Reports as having been scrutinized with care were *Tatum v. United States*, 190 F. 2d 612 (1951); *Wright v. United States*, 215 F. 2d 498 (1954); *Gunther v. United States*, 215 F. 2d 493 (1954); *Contee v. United States*, 215 F. 2d 324 (1954); *Wear v. United States*, 218 F. 2d 24 (1954); and *Taylor v. United States*, 222 F. 2d 398 (1955). H. Rep. No. 892, 84th Cong., 1st Sess., p. 3; S. Rep. No. 1170, 84th Cong., 1st Sess., p. 2.

the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

“(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) . . . and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital . . . such certificate shall be sufficient to authorize the court to order the unconditional release of the person . . . ; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released”

These provisions, on their face and as interpreted by the Court of Appeals, have an extraordinarily severe impact upon a person acquitted by reason of insanity. In the first place, he is mandatorily committed to a mental institution without any finding that he is at the time mentally ill. Indeed, he is committed without even a finding that he has at any time been mentally ill, since acquittal because of insanity means no more than that there is a reasonable doubt that the act charged to be a crime was the product of mental illness or disease. * *Davis v. United*

country. We will, in the course of our discussion of the constitutionality of the statute, advert to comparable statutes of the States. At this point, however, it may be useful to note that a defendant acquitted on grounds of insanity in the District Court of the District of Columbia receives radically different treatment than he would in any other federal court. In fact, the lower federal courts are in disagreement as to whether there is any authority at all outside the District of Columbia to commit such a person to a mental hospital. Compare *Sauer v. United States*, 241 F. 2d 640, 650-652 and note 32 (9th Cir. 1957), *cert. denied*, 354 U.S. 940, with *Pollard v. United States*, 282 F. 2d 450, 464, 285 F. 2d 81 (6th Cir. 1960). See also *United States v. Currens*, 290 F. 2d 751, 775-776 (3d Cir. 1961), and *Howard v. United States*, 229 F. 2d 602, 608 (5th Cir. 1956) (dissenting opinion), *rev'd on rehearing en banc*, 232 F. 2d 274. At any rate, even if, as the *Pollard* court held, there is such authority, the careful and detailed second opinion in that case demonstrates that (1) the authority is a discretionary one; (2) commitment is to be based upon a finding of present insanity; and (3) release is to be based upon a finding of recovery of sanity or sufficient recovery so that no danger would result. This is obviously far removed from the procedures in effect in the District of Columbia.

II. Petitioner is Entitled to His Release Because the Statutory Provisions Under Which He is Being Detained, as Construed by the Court of Appeals, Are Invalid on Their Face.

Since civil commitment proceedings have never been instituted against petitioner, the sole warrant for his confinement is sections 301(d) and 301(e). It is our view that these provisions, as construed by the Court of Appeals,

are invalid both on their face and as applied under the Due Process Clause of the Fifth Amendment, and that consequently, petitioner is entitled to be discharged.

Before we explain the basis for our position, however, we think it advisable to disclaim any intention to press these constitutional issues upon the Court as the preferable ground for decision. On the contrary, we believe that the Court's well established principle of judicial restraint dictates that the case be disposed of on the much narrower non-constitutional grounds discussed in the later portion of this brief, namely, that whatever may be said about the commitment procedures in the normal case, they cannot be foisted upon a defendant who wishes to plead guilty to a misdemeanor, or alternatively that these procedures should be construed to be inapplicable where the crime charged is not one of violence. And in this instance we regard such a course of action as especially appropriate, in view of the extraordinarily complicated nature of the constitutional issues and the probable impact of their resolution upon the Durham Rule. We are confident that the Court would wish to avoid, if possible, a constitutional decision that would freeze in any fashion the actions of the lower courts and Congress in the conduct of the Durham experiment.

If, however, the Court should reject our position on the non-constitutional issues, it would then be compelled to decide the constitutional questions. Consequently, we are obliged to analyze them. Moreover, since the non-constitutional issues cannot be appreciated fully except in the context of the constitutional questions, we believe it desirable to address ourselves first to these broader problems.

A. Section 301(d), as construed by the Court of Appeals, is unconstitutional on its face because it applies to every case where there is an acquittal on grounds of insanity, no matter how trivial the offense charged, and under these circumstances it provides insufficient safeguards to assure that commitment is justified.

Under section 301(d), commitment is automatic in every case in which there is an acquittal on grounds of insanity.¹⁴ As the case at bar demonstrates, the Court of Appeals has read the provision literally, so that it applies in misdemeanor cases as well as in felonies, and in cases where the crime charged is non-violent as well as where it is one of violence. Thus the maniacal killer is treated the same as the obsessive-compulsive overtime parker. Moreover, commitment is not grounded upon any finding whatsoever as to present insanity. The only factual basis for commitment that is required under the statutory scheme is the reasonable doubt of the trier of fact as to the individual's mental health as of a prior date, i.e., as of the time he committed the act charged to be criminal. That date, of course, may have been years in the past, and in fact a substantial time lag is the rule rather than the exception because normally the defendant will have been hospitalized prior to trial pursuant to section 301(a) for examination as to competency to be tried.¹⁵ Moreover, between the date

¹⁴ For purposes of this part of our argument, we put aside the problems involved where the accused wishes to plead guilty. As we demonstrate later, under such circumstances the unconstitutional characteristics of the procedure are aggravated.

¹⁵ For example, in *Durham* the trial took place approximately 19 months after the offense, see 214 F.2d 862, 864; in *Fielding v. United States*, 251 F.2d 878, 879 (D.C. Cir. 1957), the delay was two years and nine months; in *Douglas v. United States*, 239 F.2d 52, 54 (D.C. Cir. 1956), two years elapsed between offense and trial; and in *Askins v. United States*, 231 F.2d 741 (D.C. Cir. 1956), where, although the in-

of the alleged offense and the date of commitment there is a finding as to mental competency to stand trial. Such a finding is, of course, not necessarily incompatible with the existence of mental illness, since under section 301(a) a person is competent to be tried as long as he is able to "understand the proceedings against him . . . [and] properly to assist in his own defense." See, *e.g.*, *Durham v. United States*, 237 F. 2d 760, 761 (D.C. Cir. 1956); *Williams v. Overholser*, 162 F. Supp. 514 (D.D.C. 1958). Nonetheless, the existence of a finding of such a degree of competency underscores the necessity for a further finding as to mental illness prior to commitment.

We believe that this combination of circumstances renders the statute as construed unconstitutional on its face. The principal difficulty is that there is a lack of procedural safe-

sanity defense did not prevail, one member of the Court of Appeals believed that it should have as a matter of law, 17 years intervened between the crime and the trial.

The possible consequence of a perfectly sane and harmless person being committed under provisions like section 301(d) is obvious. See the following statements in letters on file with the Northwestern Law Review (see note 20, *infra*):

"We have, on several occasions, seen individuals who committed crimes while obviously insane, were subsequently treated and cured, then stood trial, and were declared not guilty by reason of insanity." Letter from J. Berkeley Gordon, M.D., Medical Director, New Jersey State Hospital, Sept. 7, 1961.

"Since the mental condition at the time of the crime, can change for better or for worse or remain static, by the time of the trial, this cannot be used as an accurate diagnosis of the present mental condition." Letter from Rev. Vincent Tikuisis, Psychologist, Illinois Security Hospital, Sept. 6, 1961.

"I have been involved in several cases where the trial and the finding of not guilty by reason of insanity took place years after the crime. In many of these cases, the mental condition of the patient at trial was, for all practical purposes, 'recovered from mental illness'. . . . [The] mandatory return to the state hospital very often has little to do with the mental condition of the accused several years before." Letter from William J. T. Cody, M.D., Medical Administrator, Hawaii State Hospital, Sept. 6, 1961.

guards adequate to establish a sufficient probability that the person is a fit subject for commitment. Since the Court of Appeals has firmly—and in our view properly—rejected the notion that the commitment partakes in any way of punishment, see, *e.g.*, *Hough v. United States*, 271 F. 2d 458, 462 (1959),¹⁸ the only basis for commitment appears to be the presumption that, because the person was acquitted on grounds of insanity, his mental condition is such that commitment is warranted. In view of the factors outlined above, we believe that such a presumption violates due process because there is no “rational connection between the fact proved [a reasonable doubt as to sanity at some prior time] and the ultimate fact presumed [mental illness at the time of commitment sufficient to warrant such action].” *Tot v. United States*, 319 U.S. 463, 467 (1943). The inference “is so strained as not to have a reasonable relation to the circumstances of life as we know them.” *Id.*, at 468. The validity of this conclusion is demonstrated by the fact that the statute makes the presumption

¹⁸ As Judge Bazelon, the author of *Durham* and one of the country's foremost authorities on this subject, put it in *Hough*:

“ . . . Nothing in the history of the statute—and nothing in its language—indicates that an individual committed to a mental hospital after acquittal of a crime by reason of insanity is other than a patient. The individual is confined in the hospital for the purpose of treatment, not punishment; and the length of confinement is governed solely by considerations of his condition and the public safety. Any preoccupation by the District Court with the need of punishment for crime is out of place in dealing with an individual who has been acquitted of the crime charged.”

See also the majority opinion in the case at bar and Judge Burger's opinion for the majority in *Overholser v. O'Beirne*, — F.2d — (Oct. 19, 1961).

This view is, of course, the general one regarding persons acquitted on grounds of insanity. See, *e.g.*, *Davis v. United States*, 160 U.S. 469, 485 (1895); *Hopps v. People*, 31 Ill. 385 (1863); *People v. Garbutt*, 17 Mich. 9 (1868); *State v. Bartlett*, 43 N.H. 224, 230 (1861); *Trial of Edward Arnold*, 16 How. State Tr. 695, 764-765 (1723).

conclusive, for the mandatory terms of section 301(d) preclude any hearing in which the individual would have a chance to rebut the presumption.¹⁷ Were the trial judge required to make a finding as to present mental condition and were the individual given an opportunity to contest the commitment, it might be proper to use a presumption of continued mental disease to shift the burden of proof to him. But that is not this case.¹⁸

Of course, the content of the term "rational connection" depends to a large extent upon the character of the action taken on the basis of the presumption. For example, no doubt a reasonable question as to sanity at some prior time would warrant the Government in conducting a further investigation as to present mental stability before entrusting a person with a highly important job. However, we are confident that it is unnecessary for us to belabor the fact that forced confinement in an insane asylum is a deprivation of quite a different order, and consequently we

¹⁷ This, of course, is not the situation in ordinary civil cases. See *Fugate v. Walker*, 204 Ky. 767, 773, 265 S.W. 331, 333 (1924) (a prior finding of insanity "is only *prima facie* evidence of that condition existing at [a future time]"); *Eagle v. Peterson*, 136 Ark. 72, 206 S.W. 55 (1918).

¹⁸ It is interesting that the Committee on Mental Disorder, whose report formed the basis for the 1955 legislation and constituted the principal text of the Senate and House Committee reports, seems to have assumed erroneously that there would be a stronger basis for a continued presumption than in fact there is. The Committee stated:

"Where the accused has pleaded insanity as a defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable . . . that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered." H.Rep. No. 892, 84th Cong., 1st Sess., p. 13. (Emphasis supplied.)

As acquittal on grounds of insanity does not—as the Committee must have known—even approximate such a finding. Instead, as we have indicated, it represents only a failure on the part of the prosecution to overcome "some" evidence of insanity and in consequence its failure to prove sanity beyond a reasonable doubt.

submit that in this context the mandatory commitment provision, which forecloses any inquiry into whether the person being committed is in fact wholly sane, is invalid. See *In re William M. Bryant*, 14 D.C. (3 Mackey) 489 (1885); *Barry v. Hall*, 98 F. 2d 222, 225 (D.C. Cir. 1938) ("[C]onfinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail. . . . Due process of law . . . [necessitates] an opportunity for a hearing and a defense"). In fact, we are doubtful that the "rational basis" formula, which has generally been employed only in cases involving property rights, is appropriate where personal liberty is involved. Rather, we are inclined to believe that the test should be phrased in terms akin to the standards that have been established in First Amendment cases, such as "clear and present danger" or "the gravity of the evil discounted by its improbability." See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Dennis v. United States*, 241 U.S. 494, 510 (1951). However, while we recognize that there is a difference of opinion in the Court as to the proper tests to be applied in such cases, we regard it as unnecessary to explore the matter, since even the so-called "balance of interests" criterion leads to the same result in this instance, as we believe we have demonstrated.

The problem may also be considered in terms of equal protection, in view of the elaborate procedural safeguards surrounding a civil commitment and the fact that the Government in such a proceeding has the burden of proving present insanity. See D.C. Code 21-306 *et seq.*¹⁹ There is not a sufficient basis, in our view, to distinguish for commitment purposes the ordinary citizen from the person who has

¹⁹ In our view, notice and opportunity to be heard could not constitutionally be dispensed with in civil commitment proceedings. See *Barry v. Hall*, *supra*; *In re Lambert*, 134 Cal. 626, 66 Pac. 851 (1901) (holding statute invalid); *State v. Billings*, 55 Minn. 467, 57 N.W. 794

been acquitted of a crime on grounds of insanity, especially where the crime was a non-violent misdemeanor. To put the matter concretely, what would be the response of the judiciary to a statute establishing a new civil commitment procedure under which, upon complaint, a person could be subjected to a hearing before a mental health commission, which could commit him to a mental institution upon the basis of a reasonable doubt that, when he unjustifiably refused to pay bills or dumped garbage in the street to spite his neighbor two years before, he was suffering from a mental illness, especially when the most recent medical evaluation was that he was competent to participate in the hearing? But if such a procedure would be regarded as unconstitutional—as surely it would—how can the commitment of an individual adjudged not guilty of a non-violent misdemeanor on grounds of insanity be distinguished as long as that commitment is not designed to be punishment? We submit that there is no satisfactory answer for such a distinction and that the evident discrimination renders the existing procedures invalid. We recognize, of course, that the Equal Protection Clause of the Fourteenth Amendment is not directly applicable to the District of Columbia, but we believe this Court has made it plain that the principle of equal protection is given effect through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

(1894) (same); *People ex rel. Sullivan v. Wendel*, 33 Misc. 496, 68 N.Y. Supp. 948 (Sup. Ct. 1900); *State ex rel. Fuller v. Mullinar*, 364 Mo. 858, 269 S.W. 2d 72 (1954) (same). See also the following statement by the American Bar Association Special Committee on the Rights of the Mentally Ill:

"Any person, before he is committed to a mental hospital or otherwise deprived of his liberty, should be served with notice and given a full opportunity to be heard. On this we, the Committee, insist as a constitutional requirement." 72 A.B.A. Rep. 295 (1947).

We believe that our conclusions are correct despite the fact that the section 301(d) commitment may be temporary, either because examination in the mental hospital may satisfy the physicians that confinement is not warranted or because the individual may succeed in establishing his right to release through a habeas corpus proceeding. The Court of Appeals, in upholding the validity of section 301(d), emphasized that the commitment was not necessarily permanent, *Ragsdale v. Overholser*, 281 F. 2d 943 (1960); but, with all deference to a distinguished court, this appears to us to mean nothing more than that the unconstitutional deprivation of liberty is not as severe as it might be. Several considerations are relevant in this connection. In the first place, it is obvious that the confinement will always be for a substantial period of time, since a psychiatric examination cannot be made overnight. In the second place, as we have already indicated and as we discuss in more detail in the next section of our brief, the standards for securing release are extremely onerous, and in consequence the initial commitment is all-important. And so far as the availability of habeas corpus is concerned, this burden is even heavier as a practical matter, because habeas corpus is not sought unless the government psychiatrists are unwilling to make the necessary representations, and the consequence is that in order to have any chance of success the patient must incur the considerable expense—probably prohibitive for most—of engaging the services of a private psychiatrist. Finally, we repeat that what is involved here is forced confinement, whether for weeks, months or years, in an insane asylum, and surely the attitudes of our society have not yet become so sophisticated that this may be viewed as the equivalent of a vaccination program.

In taking the position that we do, we do not wish to minimize in any way the substantial interest that society has

in protecting itself, nor do we believe, as we have indicated, that the Durham Rule should be applied without procedures adequate to safeguard this interest. All that we urge is that the procedures here involved go too far, for commitment occurs without any finding or hearing as to present mental condition or dangerousness and solely upon the basis of a reasonable doubt as to mental illness or disease when the criminal act was committed, whether that act was murder or overtime parking. And it is worth noting that the section 301(d) procedure is obviously not the only method available. For example, the statute could at least require a hearing and a finding by the trial judge immediately after acquittal as to the defendant's then mental condition and dangerousness. Such a procedure is employed in a number of states.²⁰ Compare the pre-trial procedure under the federal statute upheld in *Greenwood v. United States*, 350 U.S. 366 (1956). Nor would further examination necessarily be required at that time, since the trial judge would have available the trial testimony as well as the psychiatric re-

²⁰ The statutory situation in the states may be summarized as follows: Ten states and the Virgin Islands have mandatory commitment laws. See Colo. Rev. Stat. Ann. 39-8-4 (Supp. 1960); Ga. Code Ann. 27-1503 (1953); Kan. Gen. Stat. Ann. 62-1532 (1949); Mass. Ann. Laws, ch. 123, § 101 (1957); Mich. Stat. Ann. 28.933(3) (1954); Minn. Stat. Ann. 631.19 (as amended, Laws 1957, ch. 196, § 1); Neb. Rev. Stat. 29.2203 (1943); Nev. Rev. Stat. 175.445 (1955); N.Y. Sess. Laws, 1960, ch. 550, §§ 1-3; Ohio Rev. Code 2945.39 (Baldwin 1953); Wis. Stat. Ann. 957.11 (1958); V.I. Code Ann. 5-3637 (1957). These laws are not uniform in their terms. In Massachusetts, for example, commitment is automatic only where the crime charged was murder or manslaughter; otherwise, commitment is discretionary. Mass. Ann. Laws, ch. 277, § 16, ch. 278, § 13. And the Michigan statute applies only in murder cases.

The laws in effect in the other states are summarized as follows in Comment, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration*, 68 Yale L.J. 293, 306 (1958): (1) "Eight states grant the court discretionary commitment authority but neither establish statutory criteria nor require post-trial inquiries." (2) "In twelve jurisdictions the court may order commitment if it deems the acquitted defendant dangerous to public peace or safety." (3) "Eight states permit commitment after trial if the court

port made in connection with the inquiry into the defendant's competency to stand trial. And even the existing section 301(d) procedure might pose somewhat less serious problems if restricted to persons committing felonies of violence, since in such cases society's interest in security is more substantial than in a case like this one. In short,

determines that the defendant's mental disorder persists." (4) "In seven states, the jury determines the defendant's present mental condition in addition to his condition at the time of the alleged crime." (5) "A second jury trial to determine present mental condition is required in three states." (6) "California requires commitment unless the court believes the defendant to be fully recovered. A new sanity determination must then be made." (7) "Wyoming provides for the immediate initiation of mandatory civil commitment proceedings." (8) Tennessee has no commitment provision. The Comment also provides the citations to all of these statutes, and a more detailed summary of their provisions may be found in *The Mentally Disabled and the Law* (ed. Lindman and McIntyre, 1961), p. 373 *et seq.*

Of course, any comparison of these statutes with the District of Columbia provisions, to be entirely accurate, would have to be based upon an exhaustive study of the pertinent release provisions, the standard of proof necessary to secure an acquittal, and the state case law bearing on commitment and release. For example, in some of the mandatory commitment states, the raising of a reasonable doubt as to sanity is not sufficient to obtain an acquittal. See *Blackston v. State*, 209 Ga. 160, 71 S.E. 2d 221 (1952) (defendant must prove insanity by preponderance of the evidence); *Carroll v. State*, 204 Ga. 510, 50 S.E. 2d 330 (1948) (same); *State v. Finn*, 257 Minn. 138, 100 N.W. 2d 508 (1960); Minn. Stat. Ann. 610.10 (same); *State v. Clancy*, 38 Nev. 181, 147 Pac. 449 (1915) (same); *State v. Colley*, 78 Ohio App. 425, 65 N.E. 2d 150 (1946) (same). And we have not discovered any jurisdiction that applies the stringent tests for release that are used in the District of Columbia. In Kansas, for example, where the mandatory commitment law has been upheld, *Ex parte Clark*, 86 Kan. 539, 121 Pac. 492 (1912), the Department of Social Welfare may make the release determination or may delegate this function to the superintendent of the hospital, and the standard is that the person committed after acquittal "may be granted convalescent leave or discharged as any other committed patient." Kan. Gen. Stat. Ann. 62-1532 (1949). And it should also be noted that in Michigan, the only other state with a mandatory commitment provision that has been approved by the state courts, see *People v. Dubias*, 304 Mich. 363, 8 N.W. 2d 99 (1943), *cert. denied*, 319 U.S. 766, a special verdict is not required so that it can be determined whether the acquittal was on grounds of insanity. Consequently, as a practical matter the commitment is discretionary, for the judge may or may not request a special verdict, and if there is no such verdict

the position we adopt does not mean that the courts and the Congress would be faced with the choice of either abandoning *Durham* or jeopardizing the security of society. Moreover, it should be pointed out that the existence of these alternatives is itself relevant to the constitutional issue. See, e.g., *Shelton v. Tucker*, 364 U.S. 479, 488-489 (1960), and cases there cited.

In any event, the Court of Appeals' opinion in *Ragsdale* does lead directly to the next set of problems, for if the initial commitment is to be justified in part on the basis of its temporariness, it is plain that everything turns upon what follows.

there is no basis upon which the commitment statute can become operative. It is for this reason that the author of a soon to be published article on this general subject has concluded that the *Dubina* decision "actually upheld discretionary commitment and is not good authority for compulsory commitment." Kimbrell, *Compulsory Commitment Following a Successful Insanity Defense*, manuscript, p. 8 n. 66, to be published in 56 Nw. U.L. Rev., No. 3 (July-August, 1961). Prior to *Dubina*, *Underwood v. People*, 32 Mich. 1 (1875), had held a mandatory commitment provision invalid, and a minority of courts have held even discretionary commitment procedures invalid. See *In re Boyett*, 136 N.C. 415, 48 S.E. 789 (1904); *Brown v. Urquhart*, 139 Fed. 846 (C.C. W.D. Wash. 1905). See also *Yankulov v. Bushong*, 80 Ohio App. 497, 502, 77 N.E. 2d 88, 91-92 (1945), where the court in dicta cast doubt upon the validity of the Ohio mandatory commitment statute in the following passage:

"However, where the constitutional question of due process of law has been raised, it has been seriously questioned whether a commitment for insanity can properly be sustained in the absence of any provision for a finding as to the continuance of the insanity at the time of the trial."

But see *Gleason v. West Boylston*, 136 Mass. 489 (1884); and compare *Bailey v. State*, 210 Ga. 52, 55, 77 S.E. 2d 511, 514 (1953) with *Long v. State*, 38 Ga. 491, 507 (1868).

We wish at this point to note our indebtedness to Mr. Kimbrell, the Editor-in-Chief of the Northwestern University Law Review, for sending us the manuscript of his article in advance of printing. He informs us that the issue in which it is to appear will be mailed to subscribers on or before December 1, and consequently we are hopeful that the Court will be able to make use of what in our judgment is a perceptive and exhaustive study of some of the issues directly involved in this case.

B. Section 301(e), as construed by the Court of Appeals, is unconstitutional because of the onerous burden of proof it imposes upon the person seeking release.

The first question arising under section 301(e) may be stated as follows: What constitutional basis is there for confining a person in a mental institution until he can establish, beyond a reasonable doubt, that his mental condition is no longer such as to warrant confinement, especially when the basis for confinement is nothing other than a reasonable doubt that, at some time in the past, he was afflicted with mental disease or illness, and when he has since that time been certified as competent to participate in legal proceedings? And it is worth noting that in habeas corpus proceedings, it seems that the burden is even heavier—if that is possible—for the applicant must then prove that the hospital authorities acted arbitrarily or capriciously in refusing to certify him as “recovered” and to predict that he “will not in the reasonable future be dangerous to himself or to others.” See *Overholser v. Leach*, 257 F.2d 667, 669 (1958), *cert. denied*, 359 U.S. 1013. In view of the “no reasonable doubt” standard for release, *Ragsdale v. Overholser*, 281 F.2d 943, 947 (1960), probably a showing of arbitrariness could not be made if the hospital authorities testified merely that they had such a reasonable doubt, no matter what type of evidence the applicant introduced.

Again, the problem may be considered not only in ordinary due process terms but also in terms of the principle of equal protection as reflected in the Due Process Clause of the Fifth Amendment, in view of the existing civil commitment procedures. See D.C. Code, 21-306 *et seq.* And again, for purposes of illustration, consider the man who is brought before a civilly constituted mental health commission, is found to have refused unjustifiably to pay his bills or maliciously to have dumped his garbage on his neighbor's lawn

two years previously, is adjudged not to have been sane beyond a reasonable doubt at that time though competent to participate in the commitment proceeding, is committed to a mental institution for examination, and who, at the end of the examination, is able to adduce proof "only" that the examining psychiatrist cannot say beyond a reasonable doubt that he is sane. While such a person may receive due process in the sense of notice and hearing, it is established that burden of proof may also be an element of due process, *Speiser v. Randall*, 357 U.S. 513 (1958); cf. *Smith v. California*, 361 U.S. 147 (1959); and we cannot believe that the Solicitor General would even suggest to this Court that such a statute would be constitutional. But if it would not, how can it be argued that section 301(e) is constitutional, for the procedure under it differs only in that the subject is a person who has been acquitted of a criminal charge on grounds of insanity, that criminal charge may be petit larceny, and it is conceded that his commitment should not in any way partake of punishment.

C. *Section 301(e), as construed by the Court of Appeals, is unconstitutional because it requires a showing of freedom from "mental abnormality."*

The invalidity of section 301(e) becomes even clearer when consideration is given to what it is that the individual must prove beyond a reasonable doubt. The question may be put as follows: What is the constitutional justification, once the person who is confined has established beyond a reasonable doubt that he is sane, for continuing his confinement until he can prove beyond a reasonable doubt also that he is free "from such abnormal mental condition as would make [him] . . . dangerous to himself or the community in the reasonably foreseeable future"? *Overholser v. Leach, supra*.

The significance of this question may be more fully appreciated if it is noted that the court in *Leach* held that the individual there involved could not be released, not because he had failed to establish sanity or absence of mental disease or illness, but because he had not disproved evidence that he was "a sociopathic personality with dyssocial outlook" who would be dangerous if released. The term sociopathic personality is used by different persons to signify different things, and, perhaps partly because of this, there has been a dispute among psychiatrists as to whether the term describes a true mental disease.²¹ The important consideration for present purposes, however, is that it is plain that the *Leach* court did not regard this dispute as important, but rather believed that, even if Leach's mental condition was not serious enough to warrant classifying him either as insane or as suffering from a mental disease, he could not be released because of his "abnor-

²¹ According to English and English's *Comprehensive Dictionary of Psychological and Psychoanalytical Terms*, "sociopathic personality" means, among other things, "a broad category for disorders in one's relationship with society and with the cultural milieu. It includes antisocial and dyssocial reactions, sexual deviations, and sexual anomalies." "Sociopathy" is referred to as "a vague term covering any kind or complex of abnormal attitudes towards social environment." And according to Webster's *Unabridged New International Dictionary* (2d ed.), "dyssocial" means "unfriendly to society," "unsocial," or "selfish."

In 1952, the American Psychiatric Association altered its accepted nomenclature so as to remove the sociopathic personality and psychopathic personality disturbance from the non-disease category. *Diagnostic and Statistical Manual, Mental Disorders* (Mental Hospital Service), p. 38. In 1957, the St. Elizabeth authorities followed suit. See *In re Rosenfeld*, 157 F. Supp. 18, 21 (D.D.C. 1957); *Overholser v. O'Beirne*, — F.2d — (Oct. 19, 1961), slip op., p. 8 n. 9; Halleck, *op. cit. supra* note 2, at 311, 311 n. 94.

The psychiatrists who testified in the *Leach* and the *O'Beirne* cases agreed as to diagnosis, but disagreed as to whether the individuals could be said to have a "mental disease."

mal mental condition.”²² The consequence is that a person who is not insane or even afflicted with mental disease or illness, but who cannot establish beyond a reasonable doubt that his personality is not so “abnormal” that he might commit some sort of crime if released, can be held in custody for the rest of his life. Nor is this a chimerical fear, since continuation of confinement does not depend upon any showing that the “abnormal mental condition” may improve, *Ragsdale v. Overholser*, 281 F.2d 943 (D.C.

²² The first opinion in the *Leach* case used the words “mental disease or defect” as establishing the standard (unreported opinion entered July 10, 1958), but the terminology “abnormal mental condition” was substituted in the amended opinion. Thus “[t]he phrase . . . was obviously chosen with meticulous care, and was manifestly designed to reach the case of a sociopath acquitted on grounds of insanity who, though ‘sane’ and not mentally diseased in the terminology of some specialists, may suffer from an emotional disorder which makes him dangerous. Indeed, ‘abnormal mental condition’ is a sufficiently comprehensive standard to reach all types of mental disorders. Thus, in [*Overholser v. Russell*, 283 F.2d 195 (1960)] . . . release was denied to a person diagnosed as suffering from a ‘psychoneurotic reaction, obsessive compulsive reaction.’ In the opinion of one psychiatrist, the patient would have been ‘dangerous to society because of his checkwriting proclivity’ were he released.” *Krash, op. cit. supra*, p. 944. And see the testimony of a medical witness in the case of *Curry v. Overholser*, 287 F.2d 137 (D.C. Cir. 1960), that “abnormal mental condition” means “any condition of behavior of thinking which incapacitates an individual from making an acceptable adjustment in the community.” (Joint App., p. 51)

Krash's judgment is confirmed, not only by *Russell* and the case at bar, but also by the recent decision in *Overholser v. O'Beirne*, — F.2d — (Oct. 19, 1961), where the court, Judge Edgerton dissenting, reversed a judgment ordering the release of a person who had been acquitted of petit larceny charges on grounds of insanity four years before. The medical witnesses agreed that O'Beirne suffered from a “sociopathic personality disturbance, antisocial reaction,” but disagreed as to whether this amounted to a mental disease. Judge Burger, for the majority, stated, “The issue is not whether O'Beirne now has a ‘mental disease’ but whether he has an ‘abnormal mental condition’ which will cause him to be dangerous. . . . Judge Washington's choice of words ‘abnormal mental condition’ in *Leach* was not casual or thoughtless, but studied and calculated.” *Slip op.*, pp. 13, 14.

Cir. 1960), and it is well recognized that it is extremely difficult to treat sociopaths.²²

The implications of this confinement procedure in terms of our traditional concept that confinement, at least of the sane, depends upon criminal guilt are obvious, and some members of the Court of Appeals have expressed their serious concern. As Judge Fahy has put it:

"It is by no means clear that society can continue to deprive a person of liberty by attributing to a jury's doubt about his mental condition, which led to his acquittal and mandatory commitment, any and all evil or criminal propensities he may be thought to have, and to keep him in confinement because of them. This would transform the hospital into a penitentiary where one could be held indefinitely for no convicted offense, and this even though the offense of which he was previously acquitted because of doubt as to his sanity might not have been of the more serious felonies." *Ragsdale v. Overholser*, *supra*, at 950 (concurring opinion).

Commentators have agreed.

"But on what theory can a 'sane' person be detained in a mental institution, even assuming that he suffers

²² "The possible extension of *Durham* to psychopaths [now an accomplished fact] may create exceptional hardships. Generally considered as personality and character disorders, psychopathic abnormalities are deep-seated and substantially less amenable to treatment than psychotic reactions. Weibofen, *Mental Disorder as a Criminal Defense* 27 (1954)." Comment, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration*, 68 *Yale L.J.* 293, 303 n. 44 (1959).

See also White, *The Abnormal Personality* (2d ed. 1956), p. 398; Cleckley, *The Mask of Sanity* (1955), *passim*; medical testimony in *O'Beirne* ("[T]here is almost no cure for a sociopathic personality." Slip op., p. 9); and medical testimony in *Ragsdale*.

from an 'abnormal mental condition' and that he would be dangerous if released? . . . [T]o detain a 'sane' person in a mental institution is plainly punitive.

— In addition, the argument that such persons can be confined to protect the public because they may be potentially dangerous will not withstand the slightest scrutiny. To deprive a person of liberty because of 'evil or criminal propensities he may be thought to have' would offend due process; it 'would transform the hospital into a penitentiary where one could be held indefinitely for no convicted offense.' " Krash, *op. cit. supra*, p. 945.

"[A] decision not to release solely on the basis of potential dangerousness would be like a decision not to discharge a tubercular patient—though no longer infectious—because he is a potential killer or check-forger." Goldstein & Katz, *Dangerousness and Mental Illness; Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 Yale L.J. 225, 238 (1960).²⁴

In short, the procedure sanctioned by the Court of Appeals pursuant to section 301(e) amounts to a type of protective custody that, so far as we know, is unprecedented, that could not be applied even to a convicted felon after he serves his sentence, that plainly could not be utilized in regular civil commitment proceedings, and that consequently represents a denial of due process.

²⁴ See also Kimbrell, *op. cit. supra* note 20, at 17-18 ("These procedures [the District of Columbia release procedures] place an almost insuperable burden on the patient who attempts to obtain release via habeas corpus.").

III. Petitioner is Entitled to His Release Because the Statutory Provisions Under Which He is Being Detained are Invalid as Applied to Him.

For the reasons set forth above, we believe that the statutory provisions by virtue of which petitioner is being confined, as construed by the Court of Appeals, are constitutionally invalid on their face, and that consequently he is entitled to his release. Moreover, the invalidity of these provisions is, if anything, even plainer when they are considered as they apply to petitioner. And, if constitutional issues are to be reached, we respectfully suggest that the case could most appropriately be disposed of on these relatively narrow grounds. Basically, the factors that heavily underscore the invalidity of petitioner's confinement are two: his objection to the raising of the insanity question and the nature of the crime with which he was charged.

A. *The invalidity of petitioner's confinement is accentuated by the fact that the insanity issue was raised at his trial over his objection.*

In the ordinary case arising under sections 301(d) and 301(e), the person has sought an acquittal on grounds of insanity, and hence it might be argued that he has voluntarily accepted the consequences, including the commitment and confinement procedures of the statute. The state has no obligation to permit a defendant to escape conviction on grounds of insanity, the argument would run—or in any event on grounds of mental disease or illness under the modified *Durham* test—and consequently the state is entitled to exact a sort of *quid pro quo* for its generosity.²⁵

²⁵ This approach is implicit in *Ragsdale v. Overholser*, *supra*, at 949, where the court said:

"It is hardly asking too much to require that a defendant who is ab-

The defendant knows that if his defense succeeds he may spend a lifetime in St. Elizabeths, and his deliberate choice to run this risk amounts to "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

This, we believe, is too facile an approach. In the first place, certainly it is far from clear that the state is free to withhold an insanity defense where the crimes charged have traditionally included specific intent as a necessary element and where the penalties are severe. See *Smith v. California*, 361 U.S. 147, 150 (1959); cf. *Leland v. Oregon*, 343 U.S. 790 (1952).²⁶ And in the second place, the pressures upon a person charged with crime to claim whatever defense can reasonably be made are so great that the voluntariness of his "waiver" is subject to grave doubt.²⁷

solved from punishment by society because of his mental condition . . . should accept some restraint on his liberty. . . ."

See also *Curry v. Overholser*, 287 F.2d 137, 139-140 (D.C. Cir. 1960); *People ex rel. Peabody v. Chanler*, 133 App. Div. 159, 162, 117 N.Y. Supp. 322, 324 (1909); *Commonwealth et rel. Bickel v. Bennett*, 15 Wkly. Notes Cas. 515, 517, 18 Phila. 432, 438 (1885) ("The prisoner appealed to this defense, and it served her purpose at the time. She must take the burden with the benefit."); *Commonwealth v. Baginski*, 85 Pa. Super. 47, 49 (1925); *Bonfanti v. State*, 2 Minn. 99, 109 (1858).

²⁶ See also *State v. Strasburg*, 60 Wash. 106, 110 Pac. 1020 (1910) (statute abrogating insanity defense unconstitutional); *Sinclair v. State*, 132 So. 581, 584 (Miss. 1931) (same); *State v. Lange*, 166 La. 967, 123 So. 642 (1929); Smoot, *The Law of Insanity*, p. 373 (1929) ("So clearly has the idea of insanity as a defense to crime been woven into the criminal jurisprudence of English-speaking countries, that it has become a part of the fundamental laws thereof, to the extent that a statute which attempts to deprive a defendant of the right to plead it will be unconstitutional and void.").

²⁷ Goldstein and Katz seem to be of the view that this theory might validate the original commitment, but not the continued confinement. They state:

"In effect, the defendant, by raising the defense of insanity . . . postpones a determination of his present mental health and acknowledges the right of the state, upon accepting his plea, to detain him for diagnosis, care, and custody in a mental institution until certain specified conditions are met.

"The court might, though it is doubtful, affirm the constitutionality [of

At any rate, the point is that the waiver theory is not available to the government in this case, for petitioner deliberately chose not to raise the insanity issue (and for what turns out to have been excellent reason). Commitment and confinement were thrust upon him against his wishes, and the consequence is that the invalidity of his confinement is accentuated.

B. The invalidity of petitioner's confinement is also accentuated by the fact that the crime with which he was charged was a misdemeanor and did not involve violence.

The crime of which petitioner was acquitted was not only a misdemeanor, but also a misdemeanor that involved no violence. The application of sections 301(e) and 301(d) is arguably somewhat more justifiable where the defendant has committed a felony of violence, since then the stake of society is in preventing further injury to person rather than in protecting property rights. The confinement of petitioner, however, lays the basis for the confinement of persons in St. Elizabeths for life solely on the basis of the most petty of offenses. If petitioner's commitment and confinement are constitutional, how distinguish the case of an overtime parker who, according to psychiatrists, may have been driven to his offense by an obsessive-compulsive neurosis? Decisions other than this one confirm our conviction that our fear is anything but fanciful. See *Overholser v. Russell*, 283 F.2d 195 (D.C.Cir. 1960), where release was denied a person whose hospital diagnosis was "psychoneurotic reaction, obsessive compulsive reaction," a neurosis that apparently produced the crime with which he had been

the release provision regarding dangerousness] . . . on the theory that the defendant 'voluntarily' accepted these conditions for release by electing the defense of insanity. Realistically, this would stretch voluntariness to an absurd, though technically logical, point." *Op. cit. supra*, pp. 230, 238.

charged, i.e., writing a bad check. And see the various opinions in *Williams v. Overholser*, 259 F.2d 175, 162 F.Supp. 514, 165 F.Supp. 879, 147 A.2d 773, all involving an attempt by the government to use a charge of public drunkenness as the basis for securing a commitment and confinement under sections 301(d) and 301(e), despite the repeated efforts of appellate courts to induce the institution of civil commitment proceedings.²⁹

IV. Non-Constitutional Grounds for Reversing the Judgment Below

The factors which highlight the unconstitutionality of the statute as it is applied to petitioner also suggest the alternative bases for reversal that, as we have indicated, constitute in our view the most appropriate grounds for disposing of this case. These alternative grounds are two: First, the trial judge erred in refusing to accept petitioner's guilty plea, and second, sections 301(d) and 301(e) should not be construed to apply to petitioner.

A. The trial judge erred in refusing to accept petitioner's guilty plea.

1. The provision governing entry of guilty pleas binds the court to accept such pleas if made voluntarily and with knowledge of the consequences.

The provision governing the acceptance of guilty pleas in the Municipal Court is Rule 9 of the Municipal Court

²⁹ The Court of Appeals majority has recognized, and declared the validity of, the consequences of their position. See *Ragdale v. Overholser*, *supra*, at 947 ("It is quite possible, as appellant argues, that a person acquitted and then committed under § 24-301 on a charge calling for a maximum sentence of 18 months may be confined in St. Elizabeth's for two, five or ten years—or even beyond that. Nothing less is contemplated by the statute and nothing less will fulfill the protective and rehabilitative purposes of the statute.")

Criminal Rules. That provision, which is a duplicate of Rule 11 of the Federal Rules of Criminal Procedure, reads as follows:

"Pleas.—A defendant may plead not guilty, guilty, or, with the consent of the Court *nolo contendere*. The Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty."

This provision, to be sure, can hardly be regarded as a model of draftsmanship. The first sentence implies that the consent of the court is required only for a *nolo contendere* plea, while at first glance the opening clause of the second sentence might be read to suggest that the court also has broad discretion to refuse a guilty plea. However, the second clause of that sentence can be read quite plausibly to specify the sole condition upon which a guilty plea may be refused, i.e., where the plea is not made voluntarily or with full understanding of the nature of the charge. Since the only alternative construction would confer an undefined discretion upon the judge, and since this would be wholly inconsistent with the traditional role of the court in dealing with guilty pleas, such a construction should be rejected.

According to the Notes of the Advisory Committee on the Federal Rules, Rule 11 of the Rules of Criminal Procedure is "substantially a restatement of existing law and practice." 18 U.S.C.A., Rules 1 to 31, p. 296. The only indication given in the Notes as to the nature of "existing law and practice" is a citation to *Fogus v. United States*, 34 F.2d 97 (4th Cir. 1929), which involved only the question whether a guilty plea had been entered "by a person of com-

petent intelligence, freely and voluntarily, and with a full understanding of its nature and effect, and of the facts on which it is founded." *Id.*, at 98. Doubtless the Committee was well aware that *Fogus* involved the only situation in which the courts have regarded themselves as free to reject a tendered guilty plea. The support for this statement and for our conclusion as to the proper construction of the Rule is fully presented in the brief for petitioner, and consequently we will not restate it here. We submit that, read in the light of this background, the Rule's meaning becomes clear.

2. Assuming *arguendo* that a judge may under some circumstances refuse to accept a guilty plea even though made voluntarily and with knowledge of consequences, this is not such a case.

Although we believe our view of the proper construction of Rule 9 is correct, it is not necessary for the Court to accept—or reject—that view in order to dispose of this case, since, assuming *arguendo* that there might be some circumstances that would warrant a judge's refusing to accept a guilty plea even though proffered knowingly and willingly, this is plainly not such a case.

The authorities cited in the petitioner's brief regarding the right to enter a guilty plea, as well as what we conceive to be the solidly established tradition of permitting a defendant to manage his own case, indicate that at the least a judge's refusal to accept a guilty plea must be based upon the weightiest considerations of public policy. Such considerations are not present in this case, as a comparison of the interest of the defendant and the interest of the government discloses. The defendant, with the advice of counsel, was unwilling to risk spending a lifetime in St. Elizabeth's Hospital when that could be avoided merely by pleading

guilty to two misdemeanor charges. To be sure, if the maximum punishment were imposed under section 22-1410, petitioner could have received consecutive one year sentences and fines of \$1,000 on each of the charges. But even this may reasonably be regarded as a lesser sanction than indefinite confinement in an insane asylum; and in addition, it was probably reasonably predictable that no such sentence would be imposed. Under these circumstances, petitioner's interest in entering a guilty plea was strong indeed. The government's interest in trying petitioner, on the other hand, was minimal. While the government has an interest in protecting society from dangerously insane persons, that interest is safeguarded through civil commitment proceedings where the individual receives the benefit of appropriate procedural safeguards, especially where the only "danger" lies in an assumed propensity to cash bad checks. The only other interest that the government may have in refusing to permit a person to plead guilty is its interest in seeing that an innocent person is not convicted of a crime. We do not mean in any way to disparage this role of the state, but we do urge that it is not significant in his case. This function of the state derives its greatest value from the protection it gives to the person accused. Thus, arguably in another type of case the court could judge that the defendant's decision to plead guilty, while made intelligently, was against his real interests, since after all a trial could not put him in worse position than a guilty plea, and he might possibly go entirely free. In this case, however, the court's refusal to permit petitioner to plead guilty predictably placed him in a far worse position, for the alternative was not acquittal and release, but acquittal and indefinite confinement.

A dramatic demonstration of the truth of these conclusions is provided by the inversion of roles that took place during the trial of this case. While in the normal case the prosecutor no doubt would object to the court's refusing to

accept a guilty plea and thereafter would seek to establish the guilt of the defendant, in this case the government sought to establish the defendant's innocence while the defendant wanted to establish his guilt. Moreover, the defendant was forced to proceed under the burden of proof that traditionally is the prosecutor's, i.e., in order to succeed, he would have had to demonstrate beyond a reasonable doubt that the crime had not been the product of his mental disease or illness, while the prosecutor had merely to raise a reasonable doubt on this issue. The anomaly of the situation could hardly be more striking.

Moreover, in weighing the competing considerations relevant to this question, the Court should, we believe, consider the grave abuses that might result from rejection of our argument. If courts could, in cases like the one at bar, reject guilty pleas, the prosecutor would be in a position, under the guise of "doing justice," to seek an acquittal on grounds of insanity in petty offense cases in order to secure the indefinite confinement of "troublesome characters." And in many cases it seems certain that this could be accomplished with ease, in view of the reversal of roles that assigns the defendant the task of proving his sanity beyond a reasonable doubt in order to stay out of the mental institution. We suggest that laws such as those governing vagrancy produce enough troublesome problems without adding to the prosecution's arsenal a new weapon to deal harshly with "undesirables" who transgress society's minor prohibitions. See Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1 (1960); Foote, *Vagrancy-Type Law and its Administration*, 104 U. of Pa.L. Rev. 603 (1956); Note, *Use of Vagrancy-Type Laws for the Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950). In saying this we perhaps should add that we do not in any way mean to imply that the prosecutor or judge in the case at bar were motivated by anything but

what they conceived of as their respective duties. Nonetheless, this is plainly no guarantee that the occasional less scrupulous prosecutor will be able to resist temptation.²⁹

Other jurisdictions have recognized that the balance of interests favors leaving the raising of the insanity defense exclusively to the discretion of the defendant. The decision of the Supreme Court of Colorado in *Boyd v. The People*, 108 Colo. 280, 294, 116 P.2d 193 (1941), is directly in point. There the court unanimously ordered a commitment to a mental hospital set aside on the ground that the acquittal on grounds of insanity had been improper because the trial judge had *sua sponte* entered the plea of not guilty by reason of insanity. The court's disposition of the issue was categorical: "Under no circumstances can the Court, on its own motion, enter the plea of not guilty by reason of insanity." Cf. *Newton v. Commonwealth*, 333 Mass. 523, 131 N.E. 2d 749 (1956).

²⁹ Without intending to impute any improper purposes to anyone involved, but only to show that the instant case is not a sport, we call attention to the following account of another trial in the District of Columbia:

"A most striking example [of the opportunity given the prosecution] was the case of William G. Kloman [United States v. Kloman, Criminal No. 383-58, D.D.C., Feb. 15, 1960]. . . . Kloman specifically instructed his attorneys not to raise the defense of insanity. . . . Over strong defense objection, the prosecution called psychiatrists to the witness stand who presented 'some evidence' that Kloman's acts were the product of mental disorder. Then followed a curious spectacle, the defense urging 'not guilty', and the prosecution 'not guilty by reason of insanity'. . . . The jury not surprisingly found Kloman not guilty by reason of insanity, and he was committed to St. Elizabeths where he is today." Hallack, *op. cit. supra* note 2, at 316.

See also *Williams v. District of Columbia*, 147 A.2d 773 (D.C. Mun. Ct. App. 1958); *Commonwealth v. Curtis*, 318 Mass. 584, 63 N.E. 2d 341 (1945); Kimbrell, *op. cit. supra* note 20, pp. 22-23 ("Nor should any prosecutor or court be allowed to invoke the provisions of this statute by requesting or directing a verdict of not guilty by reason of insanity without the consent of the defendant, unless the defendant has pleaded insanity or introduced substantial evidence of such during the trial. The danger inherent in allowing the prosecution to raise the issue of insanity is that it will come to be an alternative 'penalty' which may be invoked for a criminal act.")

The rule of the *Boyd* case is also in effect in England, where the law has been described as being that "the issue of insanity at the time of the offense may not be raised either by the Judge or by the prosecution, but only by the defense." Report, Royal Commission on Capital Punishment, sec. 443 (1953). See also *Rex v. Oliver*, 6 Cr. App. 19, 20 (1910), where the Lord Chief Justice for the Court of Criminal Appeals stated:

"The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel to be used by him if he thought fit."³⁰

³⁰ In an article written prior to the decision in the instant case, Goldstein and Katz declared flatly that the defendant "alone can raise it [the insanity defense]." *Op. cit. supra*, p. 230. And in an article written after the decision in the instant case, Krash strongly took issue with the correctness of the disposition of the issue in question. *Op. cit. supra*, pp. 938-940. In the course of his discussion, he pointed out the implications of the ruling below in terms of the right to counsel and the obligations of counsel.

"The accused's privilege to enter a guilty plea is intimately associated with his constitutional right to counsel. The defendant may have been counseled to enter a guilty plea in the expectation that a less severe sentence will be imposed, or in order to avoid a public trial. On the other hand, a defendant may have been advised to plead guilty because of counsel's belief that the rigorous standards for release from hospital confinement can never be satisfied by the accused. [Footnote omitted.] A trial court's refusal to accept a guilty plea may, thus, seriously compromise the right to effective assistance by counsel.

"... If, as the Court of Appeals has stated, there is 'almost a positive duty' by a trial judge not to punish a mentally ill person, can counsel—who is an officer of the court—withhold information which could frustrate the performance by the court of its judicial duty? Can an attorney, who recommends a plea of insanity but is

These authorities take on added significance when it is noted that England enacted the first mandatory commitment statute—limited, however, to cases of “high treason, murder, or felony,” 40 Geo. 3, c. 94 (1800)—and that Colorado is one of the few American jurisdictions that have followed suit. Colo. Rev. Stat. Ann. 39-8-4 (1960 Supp.).

The policy of the rule that only the defendant may raise the insanity defense is, as we have indicated, sound at least in the context of this case, and we submit that it should be given effect here, assuming *arguendo* that the trial judge has some discretion to refuse a guilty plea intelligently tendered, by holding that under the circumstances the judge abused that discretion.³¹

B. The statute should be construed not to authorize confinement under the circumstances of this case.

There are two constructions of sections 301(d) and 301(e) that are perfectly plausible and that would permit the Court to refrain from deciding the constitutional issues presented in this case.

1. The provisions are inapplicable where the defendant does not raise the insanity defense or at any rate where he wishes to plead guilty.

Sections 301(d) and 301(e) could be construed to be inapplicable where the individual does not raise the insanity

overruled by his client, withdraw his appearance without disclosing to the court the very facts which his client wishes suppressed? And should an attorney who conscientiously believes that the welfare of his client would best be served by a plea of guilty apprise the court of the accused's mental condition? These questions are currently unresolved in the District of Columbia.” *Id.*, at 939, 940.

³¹ Were it not that the supervisory power of this Court over lower federal courts affords the basis for such a holding, we would urge that the refusal to accept the plea constituted a denial of due process, as we believe it did.

defense or, alternatively, where he wishes to plead guilty. Either of these constructions would, as we have already indicated, reduce to some extent the magnitude of the constitutional problems, and it would be superfluous to cite the many decisions in which this Court has applied the principle that Congress should not be presumed to have acted in such a way as to raise serious constitutional issues where another construction can be given the statute. Naturally, if the statutory language were unambiguous, the course we suggest would not be open; but the fact is that the statute does not expressly provide whether the consequences it commands are to follow regardless of who it is that injects the insanity issue into the case. Moreover, the Government can hardly take the position that the statute should be read literally, since the consequence would be that there could be no commitment without an affirmative finding of insanity, as opposed to a reasonable doubt as to mental disease or defect.

As Judge Edgerton pointed out in his dissent in the recent case of *Overholser v. O'Beirne*,—F.2d—(Oct. 19, 1961), where the majority reaffirmed the position it adopted in the case at bar:

“The mandatory commitment requirement and the corresponding release requirements of the District of Columbia Code, read literally, apply only when the accused is found at the trial to have been insane at the time of the offense, and therefore do not apply in the present case. The Code provides that ‘If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is *acquitted solely on the ground that he was insane* at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill’ . . . § 24-301(a)

Section 24-301(e) requires, for the person's release, a certificate by the superintendent of the hospital '(1) that such person *has recovered his sanity*. . . .' Only one who was formerly insane can have 'recovered his sanity.' " Slip op., pp. 21-22.

We agree with Judge Edgerton that "if we are to interpret § 24-301 more broadly than its literal meaning, we should not go so far beyond its literal meaning as to raise serious constitutional doubts." *Id.*, at 23.

Moreover, the Report of the Committee on Mental Disorder, upon which the 1955 legislation was based and which constituted the bulk of the Senate and House Committee Reports, supports our proposed constructions. That Report contains the following statement of justification for the proposed legislation:

"The Committee believes that a mandatory commitment statute would add much to the public's peace of mind, and to the public safety, without impairing the rights of the accused. *Where the accused has pleaded insanity as a defense to a crime*, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable [that he be committed and confined]. . . ." H. Rep. No. 892, 84th Cong., 1st Sess., p. 13. (Emphasis supplied.)

And if the Committee was of the view, as this passage indicates, that the procedures would not be applicable to someone who, while pleading not guilty, did not attempt to take advantage of the insanity defense but was acquitted on grounds of insanity anyway, it would naturally regard in the same way the case of a person who not only refrained from raising the defense but who actually attempted to plead guilty.

Two other considerations seem to us to be relevant to the question of Congressional intent. So far as the situation of the person who wishes to plead guilty is concerned, Congress should be presumed to have legislated with awareness of the established principle that guilty pleas competently made are invariably accepted. Moreover, it should be noted that neither the person who attempts to plead guilty nor the one who does not want to raise the insanity defense is at all likely to be one accused of a felony of violence, and, as we show in the next portion of the brief, it appears that Congress' purpose in enacting the commitment law was to safeguard the community from the recurrence of serious crimes of violence.

The consequence of the approach we suggest would be not only that the Court would not have to decide the constitutional questions, but also that it could, if it saw fit, sanction the trial judge's refusal to accept the guilty plea, for, absent the consequences of mandatory commitment and continued confinement, the interest of the defendant in securing acceptance of his plea is obviously reduced in importance. Moreover, we should point out that the dissenters in the court below treated sections 301(d) and 301(e) separately, apparently assuming, at least *arguendo*, that the initial commitment of petitioner was proper but concluding that continued confinement was improper. See also Judge Fahy's concurring opinion in *Ragsdale v. Overholser*, *supra*, at 949. While we, of course, take the position that the initial commitment was also invalid, it is quite true that the Court need not reach that question if it construes the release provision as inapplicable and holds that, assuming *arguendo* the validity of the initial commitment, petitioner could not be held for longer than the time required to make the examination necessary to institute civil commitment proceedings.

2. The provisions are inapplicable where the crime charged is a non-violent misdemeanor.

As we have indicated, the constitutional issues would be somewhat less grave in a case where the crime of which the individual was acquitted was a felony of violence, since arguably society's interest in protecting itself against such crimes, which inflict harm that is in a sense non-compensable, is greater than its interest in protecting itself against non-violent misdemeanors. Consequently, there is some reason for construing the statute not to apply where the crime charged is a non-violent misdemeanor. Moreover, the language of section 301(e) suggests such a construction, for it provides that release is to hinge in part upon a showing that the individual will not be "dangerous" to himself or others, and this word probably is more generally used when some sort of physical danger is involved. One would be more likely to say, for example, that a dangerous rapist is on the loose than that a dangerous bad check writer is on the loose. Finally, the Report of the Committee on Mental Disorder contains the following revealing statement concerning the problems with which the 1955 legislation was designed to deal:

"... [T]he public has a very great interest in ascertaining, and in being assured, that this question [whether the person has recovered his sanity and is no longer dangerous] is correctly determined, and that dangerous mental cases are not prematurely released to prey upon the citizenry. The newspapers of the Nation, in recent times, have contained many accounts of persons relieved of criminal responsibility by reason of insanity and who have been prematurely released from mental hospitals only to commit some further serious crime,

many of them involving rape and/or murder." H.Rep. No. 892, 84th Cong., 1st Sess., p. 13.

In view of these considerations, we regard the position of the dissenting judges below, who adopted the suggested construction of the statute, as wholly valid.²² See also the concurring opinion of Judge Bazelon in *Overholser v. Russell*, 283 F.2d 195, 198 (1960); the concurring opinion of Judge Fahy in *Ragsdale v. Overholser*, *supra*, at 949; and the dissenting opinion of Judge Edgerton in *Overholser v. O'Bierne*, *supra*, at 20. As Judge Fahy put it in his dissent in the instant case:

"... Congress in section 301(e) is not concerned with persons who have engaged in any kind of unlawful conduct, however minor, but only with persons who have engaged in unlawful conduct of a dangerous character. The language used conveys the idea of physical danger to persons and, perhaps, to property. I do not attempt to delineate precisely the boundaries fixed by the language used, but obviously they do not encompass any and every minor conflict with the law of which a person has been acquitted because of a doubt about his sanity. Had Congress intended such a broad coverage, it would have used broader language such as 'likely to engage in unlawful conduct,' rather than the narrow language of section 301(e), 'dangerous to himself or others.'

"Our jurisprudence knows no such thing in times of peace as 'preventive' or 'protective' custody of persons not guilty of crime and not found to be of unsound mind. Congress, of course, was aware of this and did

²² Again, it might be possible to separate the two statutory provisions so that initial commitment would be considered *arguendo* valid. See *supra*, p. 53.

not cloud its enactment with grave constitutional doubts by requiring a person of sound mind to be held under restraint in a mental institution on a theory he had done an act having the elements of a minor and non-dangerous offense. [Footnote omitted.] The most serious constitutional doubts are avoided by giving the provisions of section 301(e) their natural meaning which excludes non-dangerous conduct." 288 F.2d, at 397.

V. Other Constitutional Grounds for Reversing the Judgment

The arguments presented in the preceding portions of this brief are directed to what we conceive to be the most obvious grounds for reversal of the judgment. However, there are other sound reasons supporting our position that the Court might regard as affording a preferable basis for deciding the case.

A. *Psychiatric evidence at government expense should have been made available to petitioner.*

The government offered the testimony of a psychiatrist to establish a reasonable doubt as to whether petitioner's crime had been the product of mental illness or disease. Defendant, who was indigent, was naturally unable to rebut this testimony with the testimony of any other psychiatrist. Where the burden of proof upon a defendant is as high as it was in this case, and where expert testimony obviously plays a dispositive role, we believe that the principles of *Griffin v. Illinois*, 351 U.S. 12 (1956), *Burns v. Ohio*, 360 U.S. 252 (1959), *Farley v. United States*, 354 U.S. 521 (1957), *Ellis v. United States*, 356 U.S. 674 (1958); *Johnson v. United States*, 352 U.S. 565 (1957), *Eskridge v. Washington Prison Bd.*, 357 U.S. 214 (1958), and *Smith v. Bennet*, 365

U.S. 708 (1961), require that such testimony be made available to defendant. We are hard pressed to see any distinction between the government's constitutional obligation to provide an indigent defendant with a record where that is necessary for adequate appellate review and its duty to make it possible for defendant to present a meaningful defense on the issue of insanity.

B. Petitioner was deprived of adequate notice.

There was no reason whatsoever for the defendant or his counsel to anticipate that his guilty plea would not be accepted and that instead he would be placed in the position of having to establish his sanity beyond a reasonable doubt. Nor was there any continuance of the trial after the guilty plea had been rejected. Consequently, the most reasonable inference is that petitioner did not receive adequate notice of the fact that he would have to introduce evidence—and overpowering evidence at that—upon the issue of sanity. Where the circumstances establish such a strong probability of absence of notice, the general presumption of regularity of proceedings should not, we submit, apply. As the dissenting judges below put it:

“... We have no transcript of what occurred, and so we cannot accurately reconstruct the events . . . [W]e cannot say here, that a fair trial was held in the Municipal Court, with opportunity for appellee to meet the government's case. As near as we can make out from the data we have, the case was turned into an inquiry concerning appellee's sanity at the time the checks were cashed. The evidence consisted of the testimony of a psychiatrist that appellee was of unsound mind at that time. Appellee and his counsel were thus confronted with a serious situation affect-

ing appellee, and the record does not show they were given a reasonable opportunity to cope with it by showing appellee was not of unsound mind when the checks were cashed. In the absence of that opportunity, there could be no valid finding that he was not guilty by reason of insanity. . . .

" . . . [T]he preferable remedy, especially where, as here, more than a year has passed in which the petitioner has been in restraint, is not to order a second District Court hearing about what occurred at the Municipal Court trial . . . but to set aside the commitment." 288 F.2d, at 395-396.

C. Petitioner was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment.

While it is conceded that counsel was appointed for petitioner shortly before the trial (though the record does not so state), it is clear that, prior to that time, petitioner was not afforded the right of representation. The record indicates that, on the same day the trial court ordered a mental examination of petitioner, defendant waived the right to be represented by an attorney. (R. 21) Obviously this waiver was not competent, in view of the later report from the hospital declaring that petitioner was of unsound mind, although he had "shown some improvement since his admission," i.e., since the time he had purportedly waived the right to counsel.

Petitioner was entitled under the Constitution to "the guiding hand of counsel at every step in the proceedings against him," *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Obviously the arraignment and the proceedings that related to petitioner's commitment to the General Hospital for observation were "step[s] in the proceedings against him." And, although we take it to be established that in cases

arising in federal courts no specific prejudice need be shown where there is a deprivation of the right to counsel, such prejudice would not be difficult to find here. For example, counsel might have objected successfully to the hospital report's containing a finding as to petitioner's sanity at the time of the crime, inasmuch as this went beyond the requirements of the statute governing pre-trial examinations and reports. D.C. Code, 24-301(a). Moreover, the report in question was submitted by the Assistant Chief Psychiatrist of the hospital, rather than, as section 24-301(a) specifically requires, the Chief Psychiatrist, and such an error has been held by the Municipal Court of the District of Columbia to invalidate the commitment. *Leslie Driscoll v. Overholser* (unreported).²³

It is true that this issue was not presented in the petition for habeas corpus or in the petition for certiorari. However, we know of no jurisdictional bar to the Court's considering the issue at this time; under Rule 40(1)(d)(2) the Court may "at its option . . . notice a plain error not presented [in the petition for certiorari]"; and the error here is not only plain, but effects constitutional rights.

²³ While the case is unreported, an account of it appears in the *Washington Post* of Oct. 30, 1960, p. G11.

Conclusion

For the foregoing reasons the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and respondent should be ordered to discharge petitioner from custody forthwith.

Respectfully submitted,

FRANCIS M. SHEA,
734 Fifteenth St., N.W.
Washington, D.C.

LAWRENCE SPEISER,
1613 I St., N.W.
Washington, D.C.
Attorneys for Amicus Curiae.

APPENDIX

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

Section 24-301 of the D.C. Code, 69 Stat. 609, reads as follows:

"(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital

for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial the court shall order the accused confined to a hospital for the mentally ill.

“(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial.

“(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

“(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

“(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate

is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

“(f) When an accused person shall be acquitted solely on the ground of insanity and ordered confined in a hospital for the mentally ill, such person and his estate shall be charged with the expense of his support in such hospital.

“(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

“(h) The provisions of this section shall supersede in the District of Columbia the provisions of any Federal statutes or parts thereof inconsistent with this section.”

Rule 9 of the Municipal Court Criminal Rules reads as follows:

“*Pleas.*—A defendant may plead not guilty, guilty or, with the consent of the Court *nolo contendere*. The Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty.”

(9376-5)

LIBRARY

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED

NOV 1 1961

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH,

Petitioner,

vs.

WINFRED OVERHOLSER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

RICHARD ARENS

2000 P Street, N. W.

Washington 6, D. C.

Counsel for Petitioner

Of Counsel:

RUFUS KING

Southern Building

Washington 5, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provisions Involved	2
Question Presented	2
Statement of the Case	3
Summary of Argument	9
Introduction	13
Argument	17
I. The Petitioner's Commitment to St. Elizabeths Hospital, Although Not Criminal Punishment in Any Formalistic Sense, Involved the Infliction of Loss of Liberty and Other Concomitant Deprivations. It Did So Without Affording Him a Fair Hearing Upon the Issue of Insanity	17
A. The obvious and immediate consequence of forcible confinement to a public mental hospital is loss of liberty. The deprivation in the District of Columbia is compounded by the fact that loss of liberty for the hospital inmate, acquitted by reason of insanity, is indefinite and restoration to society is dependent primarily upon the almost unlimited discretion of an overburdened hospital staff, devoid of adequate therapeutic resources	17
B. In transforming the so-called hearing before it from a hearing on the merits of the charges to a hearing principally addressed to the question of whether petitioner should be committed to a mental institution, the Municipal Court for the District of Columbia denied to petitioner the rudimentary rights associated with any official hearing aimed at the control of the activities of the citizen	24

- (1) "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." *Lambert v. California*, 355 U.S. 225, at 228 (1957). Notice, in any meaningful sense, was denied to the petitioner in the Municipal Court 24
- (2) A meaningful opportunity to test, explain, and refute is essential to nothing more serious than an interference with property rights and commercial activities. See, e.g., *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U.S. 292 (1937). This opportunity was denied to the petitioner by the Municipal Court 24
- (3) A standard of proof consistent with reason and fairness is requisite to any proceeding aimed at the control of the citizen, whether by administrative or judicial means. Such a standard was denied to the petitioner in the Municipal Court 26
- II. An Accused, Adjudged Mentally Competent to Participate in a Criminal Proceeding Has the Right to Waive Any and All Defenses, Not Jurisdictional in Character, Including Those Involving Constitutional Privilege. The Assertion of Such a Right May, as in This Case, Be Essential to a Proceeding Meeting Requirements of Due Process of Law. This Has Been Denied to the Petitioner 28

A. The right to waive personal defenses is as precious as the right to assert such defenses. Even constitutional defenses which are not jurisdictional in character are subject to waiver and indeed that right of waiver is often essential to due process itself	28
B. The right to enter a guilty plea is embedded in the common law. The common law rule, in turn, must be viewed as incorporated within the Federal Rules, invoked in this case	32
C. The competent defendant's right of free choice in the conduct of his case may be impinged only under extraordinary circumstances and then only in a way which provides the defendant with reasonable safeguards	39
III. The Action of the Municipal Court Has Deprived Petitioner of the Effective Assistance of Counsel to Which He Is Entitled Under the Sixth Amendment to the Constitution	40
IV. D. C. Code Ann. §24-301(d), as Amended, Providing for the Mandatory Commitment of Any Person Acquitted by Reason of Insanity, Is Violative of the Requirements of Due Process of Law and Its Application to Petitioner Deprived the Petitioner of Due Process in the Instant Case	45
A. The statute authorizes condemnation without hearing	45
B. Application of the statute on the basis of a discretionary invocation of the insanity defense by the Municipal Court provides no ascertainable standards in bar of arbitrary action	49

	Page
V. Even If the Extraordinary Procedures in This Case Were Found to Be Consistent With Due Process of Law, the Confinement of Petitioner Within the Mental Hospital Facilities Described Above Would Violate Due Process of Law in Its Own Right	50
VI. Congress Has Provided No License for the Forcible Imposition of an Insanity Defense Upon the Petitioner	53
VII. Aside From the Above Considerations, Petitioner's Commitment Should Be Set Aside Under the General Supervisory Power of This Court as Inconsistent With the Enlightened Administration of Justice, in the Federal Courts	54
Conclusion	58
Appendix	61

TABLE OF AUTHORITIES

CASES:

<i>Albertson v. Schmidt</i> , 128 Cal. App. 344, 17 P. 2d 158	27
<i>Appeal of Sleeper</i> , 147 Me. 302, 87 A. 2d 115	18
<i>Bailey v. Alabama</i> , 219 U.S. 219	46
<i>Barbier v. Connolly</i> , 113 U.S. 27	25
<i>Barkman v. Sanford</i> , 162 F. 2d 592 (5th Cir.)	28
<i>Barry v. Hall</i> , 98 F. 2d 222 (D.C. Cir.)	25, 47
<i>Blunt v. United States</i> , 244 F. 2d 355 (D.C. Cir.) ..	56
<i>Boyd v. The People</i> , 108 Col. 289, 116 P. 2d 193 ..	37
<i>Briscoe v. United States</i> , 248 F. 2d 640 (D.C. Cir.)	15
<i>Calloway v. United States</i> , 270 F. 2d 334 (D.C. Cir.)	56
<i>Canada v. State</i> , 144 Fla. 633, 198 So. 220	33
<i>Consolidated Edison Co. v. National Labor Relations Board</i> , 305 U.S. 197	27

	Page
<i>Davis v. United States</i> , 160 U.S. 469	26, 31, 45
<i>Durham v. United States</i> , 214 F. 2d 862 (D.C. Cir.)	15, 16, 54, 55, 56, 57
<i>Edwards v. United States</i> , 256 F. 2d 707 (D.C. Cir.)	28
<i>Ex parte Hodges</i> , 166 Tex. Cr. App. 433, 314 S.W. 2d 581	43, 44
<i>Ex parte Romero</i> , 51 N.M. 201, 181 P. 2d 811	26
<i>Fogus v. United States</i> , 34 F. 2d 97 (4th Cir.) ..	38
<i>Glasser v. United States</i> , 315 U.S. 60	40
<i>Griffin v. Illinois</i> , 351 U.S. 12	25
<i>Hack v. State</i> , 141 Wis. 346, 124 N.W. 492	34
<i>Hough v. United States</i> , 271 F. 2d 458 (D.C. Cir.)	23
<i>In re Lambert</i> , 134 Cal. 626, 66 P. 851	18, 25
<i>In re Olson's Guardianship</i> , 236 Wis. 301, 295 N.W. 24	26
<i>In the Matter of Whittaker</i> , U.S.D.C., D.C., H.C. 83-61	48
<i>In the Matter of Whittaker</i> , U.S.D.C., D.C., H.C. 252-61	48
<i>Kercheval v. United States</i> , 274 U.S. 220	34
<i>Lambert v. California</i> , 355 U.S. 225	24
<i>Lynch v. Overholser</i> , H.C. 171-60	4, 6, 15, 16, 35, 49, 50, 55, 56, 57
<i>MacKenna v. Ellis</i> , 263 F. 2d 35 (5th Cir.)	30
<i>McNabb v. United States</i> , 318 U.S. 332	54, 58
<i>Miller v. Overholser</i> , 206 F. 2d 415 (D.C. Cir.)	21
<i>Mullane v. Central Hanover Bank and Trust Co.</i> , 339 U.S. 306	24
<i>National Labor Relations Board v. Thompson Products</i> , 97 F. 2d 13 (6th Cir.)	27
<i>Ohio Bell Telephone Co. v. Public Utilities Comm.</i> , 301 U.S. 292	24
<i>Opinion of Justices</i> , 9 Allen (Mass.) 585	35
<i>Overholser v. Leach</i> , 257 F. 2d 667 (D.C. Cir.) ..	22, 23
<i>Overholser v. Lynch</i> , 288 F. 2d 388 (D.C. Cir.) ..	8, 54
<i>Overholser v. Russell</i> , 283 F. 2d 195 (D.C. Cir.) ..	22, 23, 48
<i>Patton v. United States</i> , 281 U.S. 276	28, 34
<i>People v. Pieri</i> , 269 N.Y. 315, 199 N.E. 495	27

	Page
<i>Pope v. State</i> , 56 Fla. 81, 47 So. 487	33
<i>Powell v. Alabama</i> , 287 U.S. 45	41, 46
<i>Raffel v. United States</i> , 271 U.S. 494	28
<i>Ragsdale v. Overholser</i> , 281 F. 2d 943 (D.C. Cir.)	23, 48, 53
<i>Rex v. Oliver</i> , 6 Cr. App. 19	36
<i>Speiser v. Randall</i> , 357 U.S. 513	46, 47
<i>Starr v. State</i> , 5 Okl. Cr. 440, 115 P. 356	29
<i>State v. Arnold</i> , 356 Mo. 661, 204 S.W. 2d 254	18, 47
<i>State v. Bushong</i> , 159 O. St. 259, 111 N.E. 2d 918	18
<i>State v. Kaufman</i> , 51 Iowa 578, 2 N.W. 275	33, 40
<i>State v. Mullinax</i> , 364 Mo. 858, 269 S.W. 2d 72 ..	18, 25, 47
<i>Sutherland v. United States</i> , U.S.C.A. D.C., No. 16,160	41, 42
<i>Tatum v. United States</i> , 190 F. 2d 612 (D.C. Cir.)	14, 16, 26
<i>Tot v. United States</i> , 319 U.S. 463	45
<i>Twining v. New Jersey</i> , 211 U.S. 78	32
<i>Underwood v. People</i> , 32 Mich. 1	47
<i>United States v. Baldi</i> , 344 U.S. 561	25
<i>United States v. Handy</i> , 203 F. 2d 407 (3rd Cir.) ..	40
<i>United States v. L. Cohen Grocery Co.</i> , 255 U.S. 81	49
<i>United States v. Lynch</i> , U.S. 7736-59	8
<i>United States v. Lynch</i> , U.S. 7737-59	8
<i>United States v. Sturm</i> , 180 F. 2d 413 (7th Cir.) ..	28
<i>United States v. John S. Sweeney</i> , U.S.D.C., D.C., No. 466-60	44
<i>Von Moltke v. Gillies</i> , 332 U.S. 708	40
<i>West v. Gammon et al.</i> , 98 F. 426 (6th Cir.)	34, 35
<i>Whittaker v. Overholser</i> , U.S.C.A., D.C., No. 16,481	48
<i>Williams v. Overholser</i> , 259 F. 2d 175 (D.C. Cir.) ..	16
<i>Williams v. State</i> , 89 Okl. Cr. 95, 205 P. 2d 524	33
<i>Williams v. United States</i> , 250 F. 2d 19 (D.C. Cir.)	56
<i>Winn v. United States</i> , 270 F. 2d 326 (D.C. Cir.) ..	56
<i>Wolf v. Colorado</i> , 338 U.S. 25	52
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356	50

CONSTITUTIONAL PROVISIONS:

Constitution of the United States:

Fifth Amendment	2
Sixth Amendment	2, 11, 30, 42

STATUTES AND RULES:

D.C. Code Ann. §21-303	22
D.C. Code Ann. §21-306	14
D.C. Code Ann. §22-1410	3
D.C. Code Ann. §24-301	4, 6, 7, 11, 12, 13, 14, 16, 23, 53, 54, 56
Federal Rules of Criminal Procedure, Rule 11	37, 38
Federal Rules of Criminal Procedure, Rule 28 ..	6
Mass. Ann. Laws, ch. 123, §100A	55
Municipal Court of the District of Columbia, Rule 9	37
N.Y. Code of Criminal Procedure, §332	35

MISCELLANEOUS:

ABA, CANONS OF PROFESSIONAL ETHICS, Canon No. 15	40
AMERICAN PSYCHIATRIC ASSOCIATION, STANDARDS FOR HOSPITALS AND CLINICS (rev. June 1958)	20
I ARCHBOLD, A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE (Waterman ed. 1860)	32
BEANEY, RIGHT TO COUNSEL (1955)	43
II BISHOP, NEW CRIMINAL PROCEDURE (1913)	33
IV BL. COM. (Cooley ed. 1899)	33
BUTLER, LAWYER AND CLIENT (1871)	43
Comment, <i>Analysis of Legal and Medical Con- siderations in Commitment of the Mentally Ill</i> , 56 YALE L. J. 1178 (1947)	51
Comment, <i>Criminal Law—Defense of Insanity— Mandatory Commitment Statute Under the Durham Rule</i> , 15 RUTGERS L. REV. 624 (1961) ..	20

	Page
Comment, <i>The Influence of the Defendant's Plea on Judicial Determination of Sentence</i> , 66 YALE L. J. 204 (1956)	42
De Grazia, <i>The Distinction of Being Mad</i> , 22 U. OF CHI. L. REV. 339 (1955)	28
Dession, <i>Psychiatry and the Conditioning of Criminal Justice</i> , 47 YALE L. J. 319 (1938)	51
Dession, <i>Sanctions, Law and Public Order</i> , 1 VAND. L. REV. 8 (1947)	17
DEUTSCH, <i>THE SHAME OF THE STATES</i> (1948)	18
ESMEIN, <i>A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE</i> (1913)	32
FELLMAN, <i>THE DEFENDANT'S RIGHTS</i> (1958)	43
I GZOVSKY & GRZYBOWSKI, <i>GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE</i> (London, 1959)	43
Halleck, <i>The Insanity Defense in the District of Columbia—A Legal Lorelei</i> , 49 GEO. L. J. 294 (1960)	23
I HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, U.S. SENATE, 87th Congress, 1st Session (1961)	19, 51
HOUSE REPORT NO. 892, 84th Congress, 1st Session (1955)	53
JUDICIAL CONFERENCE OF THE DISTRICT OF COLUMBIA CIRCUIT, PROCEEDINGS, May 26, 1960	48
Krash, <i>The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia</i> , 70 YALE L. J. 905 (1961)	26, 55, 57
NOTES OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF CRIMINAL PROCEDURE	38
ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT (1953)	36
ROSS, <i>Commitment of the Mentally Ill</i> , 57 MICH. L. REV. 945 (1959)	22
SENATE REPORT NO. 1170, 84th Congress, 1st Session (1955)	53

INDEX

ix

	Page
Sobeloff, <i>Insanity and the Criminal Law: From M'Naghten to Durham and Beyond</i> , 41 A.B.A. J. 793 (1955)	57
Solomon, <i>The American Psychiatric Association in Relation to American Psychiatry</i> , 115 AM. J. PSYCHIATRY 1 (1958)	20
STEWART, TRIAL STRATEGY (1940)	43
WASHINGTON POST, November 27, 1960, p. A1	20
Watson, <i>Durham Plus Five Years: Development of the Law of Criminal Responsibility in the District of Columbia</i> , 116 AM. J. PSYCHIATRY 289 (1959)	57
WEINBERG, ATTORNEY FOR THE DAMNED (1957)	42
II WIGMORE, EVIDENCE (3rd ed. 1940)	30
WILLIAMS, CRIMINAL LAW: THE GENERAL PART (London, 1953)	36
WORLD HEALTH ORGANIZATION, HOSPITALIZATION OF MENTAL PATIENTS, A SURVEY OF EXISTING LEGISLATION (Geneva, 1955)	52

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH,

Petitioner,

vs.

WINFRED OVERHOLSER,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 29-38) is reported at 288 F. 2d 388 (1961).

Jurisdiction

The judgment of the District Court was entered on June 27, 1960 (R. 19-20). The judgment of the United States

Court of Appeals for the District of Columbia Circuit was entered on January 26, 1961 (R. 45). Certiorari was granted by this Court on June 19, 1961 (R. 46). The jurisdiction of this Court in this matter rests upon 28 U.S.C. §1254(1).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense."

QUESTION PRESENTED

May petitioner, charged in the Municipal Court for the District of Columbia with two misdemeanors, be committed by said court to a mental hospital as not guilty by reason of insanity if it appears:

1. that he is judicially and medically recognized as competent to participate in the Court proceedings;
2. that he is adequately assisted by counsel and that he insistently and consistently attempts to enter a guilty plea, which is refused by the Court;

3. that a trial is held and testimony tending to raise a reasonable doubt concerning his mental health as of the time of the misdemeanors charged in the informations is adduced over his objection by the Court or Government in said proceeding;

4. that he lacks adequate notice that the central issue of his trial is to be his mental health as of the time of the misdemeanors in question;

5. that he is denied psychiatric facilities in rebuttal of testimony which is presented by psychiatrists within the employ of the Government in what turns out in effect to be a trial in which his mental health appears the central consideration;

6. that no finding is made by the Court that petitioner is suffering from mental illness as of the time of the adjudication or that he is then and there dangerous to be at large or in need of treatment at a hospital;

7. that the hospital to which he is committed suffers from the defects hitherto invariably associated with the system of public mental hospitals in this country, exemplified by inadequate housing and inadequate therapeutic facilities?

Statement of the Case

On November 6, 1959, two informations were filed against petitioner in the Municipal Court for the District of Columbia, charging petitioner with violations of the Bad Check Law of the District of Columbia, D. C. Code Ann. §22-1410 (R. 25-26). The petitioner "had never before been convicted of a criminal offense and had previously served honorably

as a commissioned officer in the armed forces" (R. 36).¹ In essence, petitioner, a respected businessman, was charged with overdrawing his bank account by one hundred dollars and with failing to make appropriate restitution within a period of five days.

The Municipal Court ordered petitioner committed to the District of Columbia General Hospital for examination to determine his mental competency to stand trial, pursuant to D. C. Code Ann. §24-301 (R. 23-26). Significantly, petitioner was not represented by counsel at this preliminary stage (R. 25). Accordingly, the preliminary commitment was not subject to challenge by petitioner's counsel and the failure of the petitioner to attack the Municipal Court's original order committing him to the District of Columbia General Hospital for a mental examination was clearly attributable to his lack of legal representation.

The Municipal Court appointed counsel to represent petitioner only at a later stage.²

Thereafter, the District of Columbia General Hospital reported on December 4, 1959, that the petitioner was "of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense" (R. 23).

Almost three weeks later, the District of Columbia General Hospital reported that petitioner was capable of participating in his own defense but that he had been suffering from a mental disease at the time of the crimes

¹ The United States Court of Appeals, in deciding this case, took judicial notice of facts presented in a subsequent habeas corpus proceeding filed by the petitioner in District Court. See *Lynch v. Overholser*, H.C. 171-80 (1960).

² The practice followed by the Municipal Court for the District of Columbia in the case of the petitioner has been set forth in petitioner's brief before the Court of Appeals and never denied.

charged in the informations and that the crimes, if any, were the products of said disease (R. 24). The following day, December 29, 1959, petitioner was brought before Chief Judge Smith of the Municipal Court as competent to stand trial upon the charges then pending against him (R. 25).

In accordance with Municipal Court practice, a plea of not guilty had been entered earlier in the case on behalf of petitioner, who was not then assisted by counsel (R. 21, 25). When confronting the Municipal Court on December 29, 1959, counsel having since been appointed for petitioner as a pauper, petitioner sought insistently and consistently to effect the withdrawal of the not guilty plea entered for him without his authority and to enter a guilty plea in its stead. Chief Judge Smith refused to accept petitioner's guilty plea and proceeded to the trial of the case notwithstanding the fact that he had found petitioner, after mental examination, competent to participate in the proceedings and hence by implication competent to enter a guilty plea (R. 3, 6, 7-11). Over the objection of the petitioner evidence was heard on the charges (R. 13, 20). A Government psychiatrist, representing the District of Columbia General Hospital, testified substantially in accord with the hospital report of December 28, 1959 (R. 13, 15-17). His testimony as well was taken over the objection of petitioner's counsel (R. 13).

Petitioner's counsel, aware of the lack of facilities in Municipal Court for the procurement of qualified psychiatrists not in the employ of the Government, at Government expense, produced no evidence challenging the only psychiatric testimony in the record. In other words, in the light of established Municipal Court practice, petitioner was denied any opportunity of independent psychiatric verification of the claims concerning his mental health which were

propounded by the one psychiatrist who testified for the Government or the Court.³

Chief Judge Smith thereupon entered a judgment of acquittal by reason of insanity and ordered petitioner committed to a mental hospital, purportedly pursuant to D. C. Code Ann. §24-301(d) (R. 21, 25). He conducted no hearing and he made no determination as to petitioner's then existing state of mind or social dangerousness or even as to his need for hospitalization at that time.

It may not be irrelevant to note that petitioner, upon his commitment, was placed in a department of St. Elizabeths Hospital which housed 1,000 other mental patients and which provided precisely two psychiatrists for their "care and treatment."⁴

A petition for a writ of habeas corpus was filed in the District Court on June 13, 1960 (R. 3-7). It alleged that the Municipal Court's refusal to accept the guilty plea proffered by petitioner, after petitioner had been judicially as well as medically recognized as competent, violated due process of law; it further alleged lack of due process in conditioning petitioner's loss of liberty upon the casting of the slightest doubt, provided that it be called reasonable,

³ This Court is invited to note what has never been disputed below, to wit, that the Municipal Court for the District of Columbia lacks resources for the appointment of private psychiatrists in the case of an indigent person. Rule 28, F.R.Cr.P. is not duplicated within the context of the Municipal Court Rules.

⁴ *Lynch v. Overholser*, H.C. 171-60 (1960) in the District Court for the District of Columbia, was drawn on by the Court of Appeals, as the basis of judicial notice of such facts as that petitioner is a former Lieutenant Colonel with an unblemished civic record. It is submitted that this Court may appropriately notice on the basis of the same case, viz., *Lynch v. Overholser*, H.C. 171-60 (1960), that petitioner was placed in a department of St. Elizabeths Hospital which housed 1,000 other mental patients and which provided precisely two psychiatrists for their "care and treatment."

upon his sanity; it directly challenged the right of Court or Government to foist an insanity defense upon an unwilling and competent defendant as a direct infringement and/or circumvention of the District of Columbia Civil Commitment Law which contains appropriate provisions for a hearing as to present mental illness under a standard of proof meeting the requirements of due process of law; it alleged that petitioner was deprived of liberty without due process of law in that there was no judicial finding of present dangerousness requiring commitment; it alleged further a lack of legislative intent to permit application of the automatic commitment clause of D. C. Code Ann. §24-301, save upon an acquittal based upon an affirmative assertion of the insanity defense by petitioner; and it further attacked the constitutionality of said clause on its face and as applied as violative of due process of law (R. 3-7).

The District Court ordered the writ issued (R. 6).

Upon Return and Answer by respondent (R. 7-11), Judge McGarraghy heard oral argument upon the writ (R. 12-18). At this time petitioner's counsel expanded the basis of his attack upon the commitment of petitioner by further challenging the fairness of the Municipal Court proceeding in which petitioner was "in effect . . . called upon to defend himself *not* upon the charge of uttering a check with intent to defraud, . . . [but] was called upon [*instead*] to defend himself against the charge of insanity" (R. 13-14). (Emphasis supplied.) If such a procedure were to be condoned, the petitioner's argument went on, surely a defendant, thus threatened with a mental commitment of unlimited duration, would be entitled to formal and seasonable notice as to what it was that he was called upon to defend himself against and, in addition, to adequate psychiatric facilities in rebuttal, which in the case of the indigent should of necessity

have included the appointment of private psychiatrists at Government expense (R. 18).

The District Court, thereupon, granted the writ and ordered petitioner restored to his liberty unless within ten days from the date of its order civil commitment proceedings, meeting appropriate standards of due process, were to be instituted. It did so upon the explicit assumption that "the Municipal Court lacked jurisdiction to effect such a commitment and thereby permit the government to obtain commitment of the petitioner as of unsound mind by use of a criminal proceeding in substitution for civil commitment procedures established by law" (R. 19-20).

Respondent appealed to the United States Court of Appeals which heard this case *en banc* and then reversed the judgment of the District Court by a vote of 6 to 3. The majority specifically endorsed the proposition championed by the respondent that an insanity defense, whose success results in the automatic commitment of the defendant, can be foisted on an unwilling defendant who is mentally competent to participate in the criminal proceeding. Judges Edgerton, Bazelon and Fahy dissented (R. 28-45). See also *Overholser v. Lynch*, 288 F. 2d 388 (1961).

The sanguine prediction made by the majority of the Court of Appeals that "[n]ow that . . . [the petitioner] has received treatment, he is well on the way to unconditional release, without the probability of repeat offenses" (R. 37) has not been borne out by subsequent events. Several worthless checks appear to have been made out by petitioner while on a conditional release from St. Elizabeths Hospital. Accordingly, the conditional release was revoked on April 7, 1961 on the strength of the original Municipal Court order which had been upheld by the Court of Appeals. See *United States v. Lynch*, U.S. 7736-59 and U.S. 7737-59, Municipal Court for the District of Columbia.

This Court granted the petition for certiorari, filed by petitioner, after revocation of his conditional release, and permitted the petitioner to proceed *in forma pauperis* (R. 46).

SUMMARY OF ARGUMENT

I

The petitioner was subjected to forcible confinement in a public mental hospital, devoid of adequate facilities.

This deprivation was thrust upon him without notice and without any opportunity to contest, explain or refute.

The standard of proof utilized in determining the propriety of this deprivation was that of reasonable doubt concerning his mental health as of a past date.

Accordingly, the procedure lacked foundation in reason and fairness and violated due process of law.

II

The petitioner, who had been adjudged mentally competent to participate in the criminal proceeding then pending against him, was denied the right of waiving his defenses under circumstances gravely prejudicial to his interests.

1. The right to waive a personal defense is as precious as the right to assert it.

The denial, for example, of the right of waiving the privilege against self-incrimination may result in a reversion to the antiquated rule providing for the disqualification of parties and of interested persons as witnesses in their own behalf. This rule robs a person accused of crime of the greatest protection which an innocent man can have, i.e., the right to give an account of the matter. Such a rule is inconsistent with due process of law.

The insanity defense is not entitled to the high preferred place of constitutional privileges which have consistently been recognized as subject to waiver. Since the forcible imposition of the insanity defense in this case was calculated to deprive petitioner of his liberty for an indefinite period of time in a lunatic asylum, it cannot be viewed as comparable to putting the Government to its proof in the interests of the defendant.

2. The right to enter a guilty plea is a common law right. This right is subject to restriction only in cases of coercion or incompetency.

The court's discretion in the rejection of the guilty plea is limited to situations in which such a rejection is calculated to protect the defendant. No authority is granted to the court to reject the guilty plea under circumstances calculated to prejudice the defendant.

Significantly, the question in this case is not whether a plea of not guilty may be forced upon an unwilling accused with a view to sparing him life or loss of liberty, but rather whether a plea of not guilty may be forced upon an unwilling accused with a view to depriving him of his liberty for an indefinite period of time in a lunatic asylum.

3. Competency, in a system of accusatorial justice in a free society, presupposes the right of making a free choice in the conduct of legal proceedings. Reasons other than the fact that he is guilty may induce a defendant to plead guilty. In a society which places a prime value on the individual, the defendant must be permitted to judge for himself in this respect.

III

The petitioner was deprived of effective assistance of counsel when forced to proceed to trial after an attempted proffer of a guilty plea.

Petitioner was entitled to receive an informed estimate of his chances of acquittal and the likelihood of leniency in sentencing upon a guilty plea. Clients have traditionally depended upon such advice. In this case petitioner has been deprived of the right of following the advice of his counsel. In that process he has forfeited a substantial personal benefit traditionally linked to Sixth Amendment rights and never heretofore challenged in the courts.

IV

Application of D. C. Code Ann. §24-301(d) to petitioner violated due process of law.

1. The statutory section in question is void on its face.

Commitment under this section is mandatory following an acquittal by reason of insanity. It is not conditioned on a judicial finding that defendant is at the time of the trial, and not just at the time of the act charged, mentally ill and socially dangerous. It affords the defendant no opportunity to show cause why commitment to a mental hospital should be denied.

In brief, the statute authorizes condemnation without hearing.

Since a comparable statutory provision for civil commitment would be struck down as violative of due process of law, the D. C. criminal commitment law must fall likewise.

2. Application of the statute on the basis of the discretionary invocation of the insanity defense invites arbitrary

action by reason of a lack of ascertainable standards and hence violates due process of law.

V

The forcible commitment of an individual to a mental hospital after an acquittal by reason of insanity or indeed the forcible commitment of any individual to a mental hospital can be justified solely upon the assumption that that individual will receive needed psychiatric treatment and rehabilitation.

Patently, lack of psychiatric treatment may mean confinement for life of patients who are curable.

The time has come to speak of "medical due process" in such a case.

Since adequate conditions of psychiatric care are denied to the petitioner, the petitioner's continued confinement is in violation of due process even if the extraordinary procedures in his case were to be condoned.

VI

The legislative history of D. C. Code Ann. §24-301(d) strongly suggests that the condition precedent to automatic commitment was to be nothing short of the affirmative invocation of the insanity defense. It further suggests that such commitment was not to apply to persons who had engaged in any kind of unlawful conduct, however minor, but only to persons who have engaged in unlawful conduct of a dangerous character.

VII

The supervisory power of this Court is invoked to prevent repetition of a commitment which must be viewed as inimical to the rational and efficient administration of jus-

tice. In converting the insanity defense from a shield of the accused into a sword of the prosecution, the Court of Appeals for the District of Columbia Circuit is effectively inhibiting the exploratory use of the mental examination by defendant's counsel.

Exercise of a power which stimulates avoidance of requests for mental examinations by defense counsel may in turn imperil the cause of the fair trial, in addition to jeopardizing the rational development of the insanity defense.

Introduction

The principal question in this case is not whether a plea of not guilty may be forced upon a recalcitrant and competent defendant with a view to sparing him life or loss of liberty. It is, rather, whether a plea of not guilty may be forced upon a recalcitrant and competent defendant with a view to depriving him of his liberty for an indefinite period of time in a lunatic asylum.

This question arises from the invocation of the mandatory commitment law under the Durham Rule.

District law allows for the hospitalization of a defendant in aid of a judicial determination of his competency to stand trial⁵ and provides for the mandatory hospitalization of a

⁵ D. C. Code Ann. §24-301(a) (Supp. VIII, 1960) provides in part:

"Whenever a person is arrested, indicted, charged by information, . . . for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of

defendant acquitted by reason of insanity.⁶ In contrast to civil commitment law,⁷ which provides for a hearing under standards meeting meticulous requirements of due process of law, the mandatory commitment clause of the criminal commitment law, here at stake, provides for no hearing as to the defendant's mental state as of the time of the acquittal, nor does it vest discretion in the trial judge to refuse commitment upon a showing of recovery from mental illness at the time of the trial.⁸ Moreover, loss of liberty, under the mandatory clause of the criminal commitment law, is conditioned on nothing more than reasonable doubt concerning the mental health of the accused as of some past date. See *Tatum v. United States*, 190 F. 2d 612 (D.C. Cir. 1951).

Release from enforced hospitalization, following an insanity acquittal, is conditioned upon an affirmative showing that the patient has recovered and will not in the reasonable future be dangerous to himself or others.⁹

Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation . . ."

⁶ D. C. Code Ann. §24-301(d) (Supp. VIII, 1960) provides in part:

"If any person tried . . . for an offense . . . is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill."

⁷ D. C. Code Ann. §21-306, et seq., provides for a hearing before a mental health commission and the right to a subsequent hearing before a jury in District Court, preliminary to the commitment of the citizen as of unsound mind. The burden of proof rests entirely upon the party seeking such commitment.

⁸ D. C. Code Ann. §24-301(d) (Supp. VIII, 1960).

⁹ D. C. Code Ann. §24-301(e) (Supp. VIII, 1960) provides:

"Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and

The Durham Rule, adopted by the United States Court of Appeals for the District of Columbia Circuit in 1954, holds a defendant to be entitled to acquittal by reason of insanity "if his unlawful act was the product of mental disease or defect." *Durham v. United States*, 214 F. 2d 862, at 874-75 (D.C. Cir. 1954). In pursuance of clearly humanitarian goals, the Court of Appeals for this Circuit has appropriately held that, for purposes of asserting the insanity defense, the assumption that psychosis is a legally sufficient mental disease, and that other illnesses are not, is erroneous. See *Briscoe v. United States*, 248 F. 2d 640, at 641, note 2 (D.C. Cir. 1957).

Under these circumstances, the superimposition of the *Lynch* doctrine, permitting an enforced insanity defense upon a recalcitrant and competent defendant, upon the *Durham* jurisprudence facilitating the exoneration of the defendant by reason of insanity, raises serious questions of due process of law and the right to effective assistance of counsel.

the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital . . ."

Ironically, it is the very humanitarian philosophy of *Durham* jurisprudence which, subverted by *Lynch*, threatens the liberty of large numbers of citizens. It is not far-fetched, in its light, to envision the presentation of psychiatric testimony at the behest of the prosecution that a parking violation is attributable to the tension generated by a mild and perhaps very widespread mental disorder, which is susceptible to psychotherapy. The *Lynch* doctrine, unless repudiated by this Court, would actually appear to encourage such a development. Presentation of such psychiatric testimony, without contradiction, would then result in the automatic commitment of the defendant to St. Elizabeths Hospital for an indefinite period of time—without any assurance of adequate psychiatric treatment. D. C. Code Ann. §24-301(d) (Supp. VIII, 1960). See, also, other materials concerning the present inadequacies of the public mental hospital, cited *infra*. Such automatic commitment, moreover, would seem likely even in the face of some contradiction since loss of liberty through commitment to a mental institution, when a crime is charged, would be conditioned not upon the establishment of the insanity of the accused by proof beyond reasonable doubt, or by a fair preponderance of evidence, or by substantial evidence, but would depend instead upon the casting of the slightest doubt, provided that it be called reasonable, on the defendant's mental health. See *Tatum v. United States*, *supra*.

The willingness of the prosecution to short-circuit civil commitment safeguards to effect the indefinite hospitalization of troublesome characters under criminal commitment law has been demonstrated in the past. See, e.g., *Williams v. Overholser*, 259 F. 2d 175 (D.C. Cir. 1958).

ARGUMENT

I

The Petitioner's Commitment to St. Elizabeths Hospital, Although Not Criminal Punishment in Any Formalistic Sense, Involved the Infliction of Loss of Liberty and Other Concomitant Deprivations. It Did So Without Affording Him a Fair Hearing Upon the Issue of Insanity.

A. *The obvious and immediate consequence of forcible confinement to a public mental hospital is loss of liberty. The deprivation in the District of Columbia is compounded by the fact that loss of liberty for the hospital inmate, acquitted by reason of insanity, is indefinite and restoration to society is dependent primarily upon the almost unlimited discretion of an overburdened hospital staff, devoid of adequate therapeutic resources.*

To say that the imposition of a fine or probation is "punishment" requiring the most ponderous of procedural protection while lifelong or extensive confinement to a mental hospital is devoid of all punitive effects and hence requires no procedural protection whatsoever is to deny the very spirit of the Constitution.¹⁰

The significance of the deprivation inherent in commitment and the need for adequate procedural safeguards against improvident commitment has been increasingly rec-

¹⁰ It is common learning that this Court has moved far and fast upon the road of unequivocal rejection of the "conventional assumption that 'criminal' and 'civil' sanctions differ in nature as well as in purpose." See Dession, *Sanctions, Law and Public Order*, 1 VAND. L. REV. 8, at 14 (1947).

ognized by courts throughout the country. *State v. Mullinar*, 364 Mo. 858, 269 S.W. 2d 72 (1954); *Appeal of Sleeper*, 147 Me. 302, 87 A. 2d 115 (1952); *State v. Arnold*, 356 Mo. 661, 204 S.W. 2d 254 (1947); *In re Lambert*, 134 Cal. 626, 66 P. 851 (1901).

As expressed by the Supreme Court of Ohio in *State v. Bushong*, 159 O. St. 259, 111 N.E. 2d 918, at 921 (1953):

"The sending of a person to an institution for the criminal insane, even for a short time, is a serious matter and his confinement there is as full and effective a deprivation of personal liberty as is his confinement in jail."

In some respects, moreover, the inmate of St. Elizabeths Hospital, acquitted by reason of insanity, has reason to envy the prisoner in our penal institutions. While ostensibly committed for purposes of treatment, the patient in the public mental hospital is rarely assured of any kind of psychotherapy and, in fact, is often exposed to drastically counter-therapeutic conditions. This Court might well take judicial notice of the fact that the average legislative budgetary grant has been so notoriously inadequate as to fail to provide satisfactory living conditions, let alone adequate conditions of medical care.

The conditions prevailing in our public mental hospitals have been aptly described by a pioneer in the investigation of the public mental hospital. DEUTSCH, *THE SHAME OF THE STATES* (1958). Albert Deutsch, reporting to a Senate Committee only this year, declared with reference to his earlier study:

"I found evidence of physical brutality [in public mental hospitals] but . . . [this] paled into insignificance when compared with the excruciating suffering stemming

from prolonged, enforced idleness, herd-like crowding, lack of privacy, depersonalization and the overall atmosphere of neglect."

Referring to the present, he summarized available evidence concerning the public mental hospital as follows:

"The chronically acute shortage of physicians in most wards makes the term 'psychotherapy' a hideous mockery for most patients. In most public mental hospitals, the average ward patient comes into person to person contact with a physician about 15 minutes every month . . . " I HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE, 87th Congress, 1st Sess., March 28, 1961, 42-44 (1961).

The situation in public mental hospitals as of 1958 has been authoritatively described in these terms in the *American Journal of Psychiatry*:

"After 114 years of effort, in this year 1958, rarely has a state hospital an adequate staff as measured against the minimum standards set by our Association, and these standards represent a compromise between what was thought to be adequate and what it was thought had some possibility of being realized. Only 15 states have more than 50 percent of the total number of physicians needed to staff the public mental hospitals according to these standards. On the national average registered nurses are calculated to be only 19.4 percent adequate, social workers 36.4 percent, and psychologists 65 percent. Even the least highly trained, the attendants, are only 80 percent adequate.

" . . . In many of our hospitals about the best that can be done is to give a physical examination and

make a mental note on each patient once a year, and often there is not even enough staff to do this much." Solomon, *The American Psychiatric Association in Relation to American Psychiatry*, 115 AM. J. PSYCHIATRY 1, at 7 (1958).

On the basis of available public documents, this Court might further take judicial notice of the fact that the District of Columbia is not an exception to the gloomy picture portrayed by these competent and unbiased observers of the general scene.¹¹

The specific failure of St. Elizabeths Hospital to meet the minimal standards of the American Psychiatric Association in the doctor-patient ratio for public mental hospitals can be verified by perusal of the American Psychiatric Association's authoritative manual, entitled *Standards for Hospitals and Clinics*, 44-45 (rev. June 1958). Existing conditions in parts of the hospital inspected by the local press are not consistent with even elementary concepts of safety and sanitation, let alone adequate twentieth century psychiatric care.¹²

¹¹ It has been aptly observed:

"It is ironic that the Congressional committee responsible for the adoption of the mandatory commitment statute had included in its report a statement which recognized that the hospital facilities used to treat persons in need of psychiatric examination or treatment under the criminal procedures are inadequate." Comment, *Criminal Law—Defense of Insanity—Mandatory Commitment Statute Under the Durham Rule*, 15 BUTGERS L. REV. 624, at 631 (1961).

¹² See Washington Post, November 27, 1960, p. A1:

"An inscribed stone is imbedded in the threshold of a building at St. Elizabeths Hospital—home to some 7000 of the mentally sick.

"It reads: Built, 1853-54; repaired, 1872.

"One of the building's crowded men's wards is a kind of all-purpose room used for sleeping, eating and watching TV. Some of the patients pace it among a profusion of tables,

It is not unfair to state in the light of undisputed testimony that parts of St. Elizabeths Hospital have degenerated into mere detention centers, devoid of any therapeutic program worthy of the name. As pointed out in the statement of the case, the petitioner, upon his commitment, was placed in a department of St. Elizabeths Hospital which housed one thousand other mental patients and which provided precisely two psychiatrists for their care and treatment. If it is borne in mind that a substantial part of the time of such "psychiatrists" is spent on administrative matters and testifying in court, the pretense of any therapeutic program becomes indeed the hideous mockery referred to by the late Albert Deutsch.

This Court will also recall that not too many years ago in judicial proceedings within this Circuit the place of confinement for the "criminal insane" at St. Elizabeths Hospital was described "without contradiction" as a place characterized by "noisome, unnatural and violent acts by inmates," in fact, as a place of confinement "for the hopeless and the violent, not a place of remedial restriction." *Miller v. Overholser*, 206 F. 2d 415, at 418-419 (D.C. Cir. 1953).

The stigma arising out of an adjudication of insanity is thus easily visualized.

The loss of control over property may be yet another deprivation flowing from an adjudication of insanity. Cer-

beds, and benches. Others are frozen into a tableau; their eyes closed in almost endless sleep or focused on the 17-inch screen.

"The only bath is a shower with leaky joints bound by rags which fail to keep the water from squirting into the center of the room where it forms a puddle.

"The walls are heavy with layers of paint, which peel and buckle like paper. The human odors have so permeated the century-old woodwork that they defy the strongest of modern detergents."

tainly, this loss can be a consequence of civil commitment. See, e.g., D. C. Code Ann. §21-303 (1901). Whether such loss can be a consequence of commitment by virtue of an acquittal by reason of insanity does not seem clear at this time. In some jurisdictions the mere fact of mental hospitalization has brought such incompetence in its train. See Ross, *Commitment of the Mentally Ill*, 57 MICH. L. REV. 945, at 979-995 (1959).

It well may be, therefore, that the civil disabilities flowing from an adjudication of insanity are significantly more severe than those flowing from a conviction for a misdemeanor, the alternative which the petitioner sought to elect in this case.

Moreover, while a prisoner in one of our penal institutions can look forward to certain release upon the expiration of a set period of time, a prisoner held at St. Elizabeths Hospital, by virtue of an acquittal by reason of insanity, may linger indefinitely and, in fact, for the rest of his life. This may be the petitioner's fate if his commitment is allowed to stand.

The release procedures, created by Congress and interpreted by the United States Court of Appeals for this Circuit, have made the St. Elizabeths' inmate subject to the almost unlimited discretion of his jailers.

An individual defendant, acquitted by reason of insanity in the District of Columbia, is viewed by the Court of Appeals for this Circuit as a member of a "special class" whose release from confinement is conditioned upon his "establishing his eligibility" therefor under exacting conditions. See *Overholser v. Leach*, 257 F. 2d 667, at 670 (D.C. Cir. 1958). In sum, a defendant acquitted by reason of insanity must affirmatively establish freedom from any "abnormal mental condition"—a term encompassing any and all mental disorders, however mild. *Overholser v. Russell*, 283 F. 2d 195 (D.C. Cir. 1960). In this context

he must also prove the absence of any form of social dangerousness. This social dangerousness, moreover, has been viewed by the majority of the Court of Appeals as capable of being manifested by nothing more than a "check writing proclivity," stemming from a "psychoneurotic reaction." *Overholser v. Russell*, *supra*.

In a word, the release of the St. Elizabeths' inmate is authorized only upon an affirmative certification by the hospital authorities that he has recovered from mental illness and is not likely to be dangerous to himself or others in the reasonable future. In the absence of such a certification his freedom depends upon proving, by what for all practical purposes amounts to evidence beyond reasonable doubt, that the hospital authorities have been arbitrary and capricious in failing to make the required certification and that he has indeed recovered from his mental illness in the manner indicated. See D. C. Code Ann. §24-301(e) (Supp. VIII, 1960). See also *Overholser v. Russell*, *supra*; *Ragsdale v. Overholser*, 281 F. 2d 943 (D.C. Cir. 1960); *Hough v. United States*, 271 F. 2d 458 (D.C. Cir. 1959); *Overholser v. Leach*, *supra*, at 669.

In this light, inadequacy of facilities for appropriate psychiatric treatment may render the subjection of the citizen to confinement at St. Elizabeths Hospital, pursuant to an insanity acquittal, more serious by far than confinement in a conventional prison. For too many, under existing circumstances, the mental hospital is transformed into a penitentiary which does not even permit the hope of any future release.¹³

¹³ An excellent portrayal of the plight of such St. Elizabeths patients is provided by Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei*, 49 GEO. L. J. 294 (1960).

B. In transforming the so-called hearing before it from a hearing on the merits of the charges to a hearing principally addressed to the question of whether petitioner should be committed to a mental institution, the Municipal Court for the District of Columbia denied to petitioner the rudimentary rights associated with any official hearing aimed at the control of the activities of the citizen.

- (1) "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." *Lambert v. California*, 355 U.S. 225, at 228 (1957). Notice, in any meaningful sense, was denied to the petitioner in the Municipal Court.

Petitioner, whose liberty was put in jeopardy by an enforced insanity defense, had no formal notice that his hearing upon a criminal charge would be transformed into a hearing upon his sanity. Moreover, the inversion of the roles of the prosecution and defense upon the rejection of petitioner's guilty plea nullified even the possibility of informal notice, if it ever existed. In brief, petitioner, as well as his counsel, were unaware of the new roles they were expected to play in the trial in which the usual and conventional positions were turned topsy-turvy.

- (2) A meaningful opportunity to test, explain, and refute is essential to nothing more serious than an interference with property rights and commercial activities. See, e.g., *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950); *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U.S. 292 (1937). This opportunity was denied to the petitioner by the Municipal Court.

In the context of petitioner's case in the Municipal Court, a meaningful opportunity to test, explain and refute could mean nothing more nor less than an opportunity for independent psychiatric scrutiny of the facts and the procurement of private psychiatrists on behalf of the petitioner. Since petitioner was indigent, this opportunity could be accorded to him only if private psychiatrists were made available to him at Government expense. This opportunity was not accorded to petitioner. As expressed by Mr. Justice Black for this Court:

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."
Griffin v. Illinois, 351 U.S. 12, at 19 (1956). Cf. *Barbier v. Connolly*, 113 U.S. 27, at 31 (1885).

The petitioner's trial in Municipal Court depended entirely upon the amount of money he had, or, rather, he did not have. His indigency resulted in a loss of opportunity deemed essential to due process in hearings affecting nothing more meaningful than the disposition of property rights.¹⁴

In effect, the petitioner was deprived of his liberty without an opportunity to be heard upon the subject of his mental health. It would follow that his confinement lacks constitutional validity as a consequence. See *State v. Mullinax, supra*; *Barry v. Hall*, 98 F. 2d 222 (D.C. Cir. 1938); *In re Lambert, supra*.

¹⁴ The case of *United States v. Baldi*, 344 U.S. 561 (1953), cannot be viewed as authority for the proposition that the right of independent psychiatric expertise is irrelevant to due process. While this Court did state that it could not "say the state has . . . [the] duty by constitutional mandate" to appoint a private psychiatrist to make a pretrial examination of a defendant in a state criminal proceeding, it did so in the context of a case in which psychiatric expert witnesses had in fact been available to the defendant in his trial.

- (3) A standard of proof consistent with reason and fairness is requisite to any proceeding aimed at the control of the citizen, whether by administrative or judicial means. Such a standard was denied to the petitioner in the Municipal Court.

It is impossible to see how commitment to a mental hospital can be effected by proof which is less than clear, convincing and satisfactory, without transgressing the constitutional command of due process. See *Ex parte Romero*, 51 N.M. 201, 181 P. 2d 811 (1947); *In re Olson's Guardianship*, 236 Wis. 301, 295 N.W. 24 (1940).

Specifically, the standard of proof applicable to the petitioner's hearing in Municipal Court, when what appeared to be a criminal prosecution was transformed into an inquisition of petitioner's sanity, was solely that of reasonable doubt concerning the petitioner's sanity as of the time of the crimes charged in the informations. In this context, since the Government needed evidence only sufficient to raise a reasonable doubt concerning petitioner's sanity, petitioner was in practical effect under the burden of disproving insanity beyond all reasonable doubt—if he were to prevail against the Government in this matter.¹⁵ See *Davis v. United States*, 160 U.S. 469 (1895); *Tatum v. United States*, 190 F. 2d 612 (D.C. Cir. 1951). Clearly, this is a most unequal contest in which the petitioner cannot be deemed to have been afforded due process of law. It is not likely that this by-passing of conventional procedures for commitment of the mentally ill could have been authorized by this Court in *Davis v. United States*, *supra*.

¹⁵ For a lucid discussion of the inequality of the contest thus forced upon petitioner, see Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905, at 938-940 (1961).

Aside from the obvious unfairness to petitioner, the procedure employed in the petitioner's case by the Municipal Court can hardly be denominated rational.

The observation is relevant in this context that "*the rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power.*" *National Labor Relations Board v. Thompson Products*, 97 F. 2d 13, at 15 (6th Cir. 1938). (Emphasis supplied.) As expressed by this Court, the greatest flexibility in administrative procedure cannot be deemed to authorize orders "without a basis in evidence having rational probative force." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, at 230 (1938). Condonation of the proceedings of the Municipal Court will constitute in effect authorization by this Court for the issuance of orders affecting human liberty upon a doubt, however reasonable, i.e., "without a basis in evidence having rational probative force," as those terms have been traditionally understood and applied in this country. Thus authority will be provided to any trial court to pass "the dividing line between law and arbitrary power."¹⁶

The observation of a recent legal publicist in considering the impact of some forms of forensic psychiatric practice on the civil liberties of the individual does not, at this point, seem inapposite:

"Aristotle observed long ago that punishment is a sort of medicine.' We have considerable cause today to

¹⁶ If this were permitted to come to pass, loss of liberty would be conditioned upon what in effect amounts to suspicion alone. It cannot be claimed that this method is consistent with ordered liberty. See, e.g., *People v. Pieri*, 269 N.Y. 315, 199 N.E. 495 (1936); *Albertson v. Schmidt*, 128 Cal. App. 344, 17 P. 2d 158, at 159 (1932).

observe that medicine can be a sort of punishment, *sans due process of law.*" De Grazia, *The Distinction of Being Mad*, 22 U. OF CHI. L. REV. 339, at 355 (1955).

II.

An Accused, Adjudged Mentally Competent to Participate in a Criminal Proceeding, Has the Right to Waive Any and All Defenses, Not Jurisdictional in Character, Including Those Involving Constitutional Privilege. The Assertion of Such a Right May, as in This Case, Be Essential to a Proceeding Meeting Requirements of Due Process of Law. This Has Been Denied to the Petitioner.

A. *The right to waive personal defenses is as precious as the right to assert such defenses. Even constitutional defenses which are not jurisdictional in character are subject to waiver and indeed that right of waiver is often essential to due process itself.*

The Courts have consistently recognized the right of waiver of constitutional safeguards. See, e.g., *Patton v. United States*, 281 U.S. 276 (1930); *Raffel v. United States*, 271 U.S. 494 (1926); *Edwards v. United States*, 256 F. 2d 707 (D.C. Cir. 1958); *United States v. Sturm*, 180 F. 2d 413 (7th Cir. 1950).

As stated in *Barkman v. Sanford*, 162 F. 2d 592, at 594 (5th Cir. 1947):

"It seems thoroughly established that an intelligent accused may waive any constitutional right that is in the nature of a privilege to him or that is for his personal protection or benefit."

The significance of the right of such waiver to a fair defense has been aptly set forth in *Starr v. State*, 5 Okl. Cr. 440, 115 P. 356, at 367 (1911):

"Generally speaking, the constitutional provisions guaranteeing to every accused person in a criminal action certain rights may be separated into two classes. First, those in which the public generally, and as a community, is interested, as well as the accused, and which are jurisdictional as affecting the power of the court to try the cause, second, those more in the nature of privileges which are for the benefit of the accused alone, and do not affect the general public. The former cannot be waived. Jurisdiction to try the cause is conferred by the law. Consent cannot confer jurisdiction, but *the accused may waive a constitutional right or privilege designed for his protection*, where no question of public policy is involved. The public as well as the accused have an interest in every criminal trial. The life and liberty of the citizen is a matter of supreme importance to the state, and it should not allow him to throw either away by a failure, intentional or otherwise, to take advantage of his constitutional safeguards. *It will not do, however, to say that because the state has a peculiar interest in protecting the citizen accused of crime to the extent of his constitutional rights that he shall in no case be allowed to waive them, for in some cases it may be to his interest to waive them, and the denial of the right to do so would defeat the very object in view when the rights were given, and cause them to operate to the injury rather than to the benefit of the accused.*" (Emphasis supplied.)

It is elementary that the privilege against self-incrimination is subject to waiver. The obvious requires emphasis

in this context. Were the privilege against self-incrimination not subject to waiver, the ensuing trial might well constitute a rejection of a rule of reason essential to fair trial. For the refusal to recognize the right of waiving the privilege against self-incrimination would prevent the accused from testifying in his own behalf and would thus constitute a reversion to the discarded rule of by-gone days which provided for the disqualification of parties and of interested persons as witnesses on their own behalf and which did not permit the accused the right to summon witnesses in his defense in criminal cases. See II WIGMORE, EVIDENCE, §575-579 (3rd ed. 1940). This rule has been appropriately described as "barbarous." *Ibid.* It is self-evident that it robs a person accused of crime of the "greatest protection which an innocent man can have . . . [i.e., the protection inherent in the right] to give an account of the matter . . ." *Id.*, §579.

It requires no elaborate argument to show that such a rule cannot be squared with the requirements of due process.

The Sixth Amendment right of assistance of counsel may indeed be subject to waiver too as a matter of due process of law. As stated by the Court in *MacKenna v. Ellis*, 263 F. 2d 35, at 41 (5th Cir. 1959):

"The defendant, being *sui juris* and mentally competent, had a *right* to rely on his own skill and ability to conduct his defense in person without the assistance of counsel; and the Court was not justified in imposing assigned counsel upon the defendant against his will." (Emphasis supplied.)

The insanity defense is not entitled to the high preferred place of the privilege against self-incrimination or of the right to assistance of counsel in our system of criminal justice.

The refusal to recognize the right of waiving an insanity defense would, as shown above, involve an inversion of the roles of prosecution and defense and the infliction of a negative sanction on the basis of a mere doubt; in sum, it would operate as oppressively as the refusal to recognize the right of waiving the privilege against self-incrimination. The rule established by this Court in *Davis v. United States*, 160 U.S. 469 (1895), requiring the trial court to consider evidence of insanity concerning the accused, regardless of whether such evidence was produced by prosecution or defense witnesses, can be reasonably interpreted only as creating a shield for the accused, not a sword for the prosecution. It would seem a mockery of the spirit of our institutions to permit a right, created for the protection of the accused, to be transformed into a means for the indefinite confinement of the accused at the behest of the Government.

One is bound to add that the insanity defense is by no means the only defense which could be used by the Government to defeat the interests of the defendant. The Government, for example, could assert with equal ease the defense of alibi. Thus a guilty plea to a parking violation might be barred upon the representation by the Government that the defense of alibi should be submitted to the court. Following the procedure condoned by the Court of Appeals in *Lynch*, the Government might then attempt to show that the defendant could not have been guilty of the parking violation because precisely at the time of the violation charged in the information he was engaged in sabotaging military installations, attending a meeting called by a Communist-infiltrated group, or keeping an illicit tryst with a neighbor's wife. While, of course, no conviction could be obtained under such circumstances, the deprivation inflicted upon the defendant by this "defense" might constitute punishment infinitely more severe than any that could be in-

flicted after conviction upon the charge in question. This is transformation of the accusatorial into the inquisitorial system of justice without the safeguards of the latter. See generally EAMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* (1913).

As stated by Mr. Justice Moody, for this Court, in *Twining v. New Jersey*, 211 U.S. 78, at 101 (1908), "no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government."

B. The right to enter a guilty plea is embedded in the common law. The common law rule, in turn, must be viewed as incorporated within the Federal Rules, invoked in this case.

The right to enter a guilty plea and to waive his defenses is secured to the defendant under the common law, once it is clear that the defendant is competent and that his action is voluntary.

To be sure, Archbold declared it to be sound judicial practice to warn the defendants before the bar of justice as to the consequences of a guilty plea. Immediately, however, he went on to declare:

"If . . . they still persist in their plea of guilty, it is then recorded . . . and in the record, when made up, the judgment . . . follows the plea." I ARCHBOLD, *A COMPLETE PRACTICAL TREATISE ON CRIMINAL PROCEDURE*, 355-356 (Waterman ed. 1860).

II BISHOP, NEW CRIMINAL PROCEDURE, §795 (1913), decisively enunciated the common law rule as follows:

"Undoubtedly a prisoner of competent understanding, duly enlightened, has the *right* to plead guilty instead of denying the charge." (Emphasis supplied.)¹⁷

The right to enter a guilty plea has been repeatedly recognized by state courts. Thus, in substantially identical language state courts have held time and again that "[i]n a criminal prosecution a defendant has a *right* to plead guilty . . ." *Williams v. State*, 89 Okl. Cr. 95, 205 P. 2d 524, at 542 (1949); *Canada v. State*, 144 Fla. 633, 198 So. 220, at 223 (1940); *Pope v. State*, 56 Fla. 81, 47 So. 487, at 488 (1908). (Emphasis supplied.) The matter has been stated incisively by the Supreme Court of the State of Iowa in these terms:

"It matters not whether the defendant is in fact guilty, the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to go plead, and thereby the state may be deprived of the services of the citizen, and yet the state never actively interferes in such a case, and the right of the defendant to so plead has never been doubted. *He must be permitted to judge for himself in this respect.*" *State v. Kaufman*, 51 Iowa 578, 2 N.W. 275, at 276 (1879). (Emphasis supplied.)

¹⁷ Contrary to respondent's contention in respondent's brief in opposition to the petition for certiorari, Blackstone can be quoted only in support of the common law rule as enunciated above:

"Upon a simple and plain confession, *the court hath nothing to do but to award judgment*: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally *advise* the prisoner to retract it, and plead to the indictment." IV BL. COM. 329 (Cooley ed. 1899). (Emphasis supplied.)

Speaking for this Court in *Kercheval v. United States*, 274 U.S. 220, at 223 (1927), Mr. Justice Butler declared:

"A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." (Emphasis supplied.)

See also *Patton v. United States*, 281 U.S. 276, at 307-308 (1930):

"In this respect we fully agree with what was said by the Supreme Court of Wisconsin in Hack v. State, 141 Wis. 346, 351, 352, 45 L.R.A. (N.S.) 664, 124 N.W. 492:

'The reasons which in some sense justified the former attitude of the courts have . . . disappeared, have perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to us why a person accused of a lesser [than capital] crime or misdemeanor, who comes into court with his attorney, fully advised of all of his rights, and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it.'"

Yet another succinct and authoritative summary is provided by the Court in *West v. Gammon et al.*, 98 F. 426 (6th Cir. 1899):

"But while the right of everyone to have his cause tried, or to be tried himself if accused of crime, by a jury, is guaranteed and established beyond the power of the legislature to abridge it, the Constitution does not compel anyone to exercise the right thus secured; and there is no reason whatever to suppose that its makers designed to repeal or alter the moss-grown rule of the common law, 'by which a party indicted for an offense, however grave in its nature, may enter a plea of guilty thereto, if he sees fit so to do . . .'" *West v. Gammon et al.*, *supra*, at 428. See also *Opinion of Justices*, 9 Allen (Mass.) 585 (1866).

The only valid exception to this "moss-grown rule of the common law" is found in various statutory enactments, barring the acceptance of the guilty plea to capital crimes. See, e.g., N. Y. Code Cr. P. §332 (1889).¹⁸

Injection of the issue of insanity has never been deemed to establish an exception to this general rule.

Thus it is the law of England "that the issue of insanity at the time of the offense may not be raised either by the Judge or by the prosecution, but only by the defense."

¹⁸ No valid analogy is possible between the *Lynch* rule and the statutory bar against a guilty plea in capital prosecutions. The death penalty case is a warranted exception. In that exceptional situation, denial to defendant of the waiver of his rights cannot conceivably operate to the defendant's prejudice. Moreover, there is a world of difference between a statutory enactment, uniformly rejecting a guilty plea and providing for a trial in all cases of capital crimes—and a judge-made law, allowing for judicial discretion in the imposition of an insanity defense on a competent and recalcitrant defendant upon some evidence of insanity and then permitting incarceration of that defendant in a lunatic asylum on the basis of a doubt as to his mental health. The former exemplifies a government of laws, zealous in the protection of individual rights, the latter—a government of men permitting the transformation of the shield of the insanity defense into the sword of the prosecution in effecting the indefinite confinement of the accused without significant safeguards.

See ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, Section 443 (1953).

The English position was stated by the Lord Chief Justice for the Court of Criminal Appeals in *Rex v. Oliver*, 6 Cr. App. 19, at 20 (1910):

"The question came up seven or eight years ago, when a practice arose of the Crown calling the prison doctor to prove insanity. All the Judges met and resolved that it was not proper for the Crown to call evidence of insanity, but that any evidence in the possession of the Crown should be placed at the disposal of the prisoner's counsel *to be used by him as he thought fit.*" (Emphasis supplied.)

Underlying the English rule is the clear-cut awareness of the oppressive results of a successful insanity defense in all but the most serious of cases.¹⁹

The rule enunciated by the Supreme Court of the State of Colorado seems substantially identical with the English

¹⁹ Exegesis upon the English rule by a leading authority has stressed the importance of the rule for the protection of the rights of the defendant:

"In a trial on indictment, it rests entirely with the accused to decide whether to set up the defence of insanity. . . . The prosecution are not allowed to give evidence of insanity, but should put the defending counsel in possession of any evidence that they may have on the subject, to be used by him if he thinks fit. . . . The judge is debarred from raising the insanity issue of his own motion. . . . To raise . . . [the insanity issue] invites prolonged if not permanent detention in a Broadmoor institution; not to raise it means that there is a chance of complete acquittal or of a limited prison sentence; and if the accused is in truth insane he may, notwithstanding the conviction, be transferred to a Broadmoor institution. Thus except in murder there is generally no disadvantage to the accused, but in fact an advantage, in not raising the defence." WILLIAMS, CRIMINAL LAW: THE GENERAL PART, §93 (London 1953).

rule. In *Boyd v. The People*, 108 Col. 289, 116 P. 2d 193 (1941), a unanimous Court declared:

"Under no circumstances can the Court, on its own motion, enter the plea of not guilty by reason of insanity. Such a plea is in the nature of confession and avoidance . . . [T]he defense can only be raised by special plea." *Boyd v. The People*, *supra*, 116 P. 2d 193, at 195.²⁰

The invocation of the alleged powers conferred upon the trial judge by the terms of Rule 9 of the Municipal Court in the District of Columbia, an exact replica of Rule 11, F.R.Cr.P., in no way changes this result. The language of the Rule is self-explanatory. "A defendant *may* plead . . . guilty." (Emphasis supplied.) Only for the plea of *nolo contendere* does he require "the consent of the court." Significantly, the Rule then goes on, "[t]he court *may* refuse to accept the plea of guilty"—but the scope of this power is directly delimited by linking it in immediate sequence with the preceding clause that it "shall not accept the [guilty] plea without first determining that the plea is made *voluntarily with understanding of the nature of the charge*." (Emphasis supplied.) The intent that emerges is clearly one of affording the power of the court the necessary latitude in cases of reasonable doubt that the plea is made voluntarily with understanding of the nature of the charge and not in *any* case.

The Court's discretion, in sum, is limited to the protection of the accused; no authority is granted to the Court

²⁰ In that case, the Court reversed an order committing an accused to a mental hospital. The specific basis for reversal was the holding that the accused had been improperly acquitted by reason of insanity because the trial court had, *sua sponte*, entered a plea of not guilty by reason of insanity.

to reject a guilty plea with a view to prejudicing the accused and helping the Government.

In the case at bar the rejection of the guilty plea was not motivated by the desire of the Court to put the Government to the proof in order to protect the defendant's liberty; it was motivated instead by the desire of foisting a specific defense upon a recalcitrant defendant in order to effect his loss of liberty by confinement in a lunatic asylum.

The Notes of the Advisory Committee on the Federal Rules of Criminal Procedure make it plain that the rule-makers sought merely the re-enactment of previously established common law practice and sought to safeguard the defendant against the effects of duress and lack of understanding. See 18 U.S.C.A., F.R.Cr.P., Rule 11, Notes of Advisory Committee on Rules. See also *Fogus v. United States*, 34 F. 2d 97 (4th Cir. 1929), specifically cited by the Advisory Committee as illustrative of its intent and involving solely the question of whether a guilty plea has been freely and voluntarily entered "by a person of competent intelligence . . . and with a full understanding of its nature and effect and of the facts on which it is founded." *Id.*, 98.

It would follow that if, in the light of such understanding, the defendant, properly assisted by counsel, persists in his plea, no discretion resides in a Court to refuse it.

Although fully entitled to it, this case, however, is not dependent upon the enunciation of a principle as broad as this. We reiterate: *The question in this case is not whether a plea of not guilty may be forced upon a recalcitrant and competent defendant with a view to sparing him life or loss of liberty, but rather whether a plea of not guilty may be forced upon a recalcitrant and competent defendant with a view to depriving him of his liberty for an indefinite period in a lunatic asylum.*

C. The competent defendant's right of free choice in the conduct of his case may be impinged only under extraordinary circumstances and then only in a way which provides the defendant with reasonable safeguards.

In general, if a competent defendant is to be denied the right of making a free choice in the conduct of his case, the concept of competency becomes meaningless and the defendant is transformed into a pawn of governmental power.

The majority ruling of the United States Court of Appeals in the petitioner's case, moreover, restricts the right of a competent defendant in a federal criminal proceeding, who may need treatment, to make a free election as to the best available therapeutic conditions. Thus, e.g., a defendant, in need of psychiatric treatment, may be denied the right of choosing private psychiatric facilities of a significantly higher caliber than those prevailing in a public mental hospital or, indeed, he may be denied the right of the equally rational election of the psychiatric facilities of a penal institution in preference to those of a public mental hospital. All this would appear to be justified upon the assumption that the Government may exercise a parental role and treat the defendant as a child incapable of any choice, a view not consistent with traditional conceptions of competency, or upon the alternate assumption that the treatment facilities in public mental hospitals are indeed truly adequate. Neither of these assumptions can be rationally maintained in the light of existing realities in our system of democratic justice.

As aptly noted by the Supreme Court of the State of Iowa, "[r]easons other than the fact that he is guilty may induce a defendant to . . . plead [guilty]." None the less, if the concept of competency is not to be rendered meaningless, the defendant "*must be permitted to judge for him-*

self in this respect." (Emphasis supplied.) *State v. Kaufman*, 51 Iowa 578, 2 N.W. 275, at 276 (1879).

III.

The Action of the Municipal Court Has Deprived Petitioner of the Effective Assistance of Counsel to Which He Is Entitled Under the Sixth Amendment to the Constitution.

A free society, maintaining an accusatorial form of criminal justice, is bound to accord the defense counsel in a criminal case the unambiguous status of an advocate for the interests sought to be protected by his client.

The matter has been put succinctly by Maris, J., in *United States v. Handy*, 203 F. 2d 407, at 426 (3rd Cir. 1953), cert. den. 346 U.S. 865 (1953):

"When counsel is retained by a defendant to represent him in a criminal case he acts in no sense as an officer of the state. For while he is an officer of the court his allegiance is to his client whose interests are ordinarily diametrically opposed to those of the state."

In a society placing a prime value on the individual, the defense counsel cannot be regarded as a mouthpiece of community policy, however progressive and enlightened, but solely as the representative of all of his client's interests. *Glasser v. United States*, 315 U.S. 60, at 70 (1942); see also *Von Moltke v. Gillies*, 332 U.S. 708, at 725 (1948).²¹

²¹ In the words of the Canons of Ethics:

"The lawyer owes 'entire devotion' to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability, to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty." ABA, CANONS OF PROFESSIONAL ETHICS, Canon No. 15.

The defendant, in turn, is entitled to "the guiding hand of counsel at every step of the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, at 69 (1932).²²

It would seem that, if the guiding hand of counsel is not to be denied, counsel should explain to his client the limitations of public psychiatric facilities to afford him an intelligent choice between existing alternatives. In the presence of overcrowded and inadequate psychiatric facilities in a public hospital, it may in fact be the duty of counsel to advise his client to enter a guilty plea to prevent his confinement in what both counsel and client may choose to regard as humiliating and counter-therapeutic conditions. This duty may be rendered more compelling by the possibility that a client, actually in need of psychiatric care, may be in a position to secure such care by private means through outpatient psychiatric facilities of a significantly more satisfactory character than those available within a public hospital.

Such a duty may be rendered equally compelling by the possibility that a client, in need of psychiatric care, may even receive more adequate treatment in a penal rather than a public psychiatric institution.²³

²² Counsel may advise the entry of a guilty plea to a given charge as essential to the protection of the defendant against a more serious charge which may emerge as a result of the evidence which may be brought to light in public trial. Counsel may also advise a guilty plea to a minor charge with a view to using the judgment of conviction obtained within that case as a bar to a threatened prosecution in a more serious matter arising out of a substantially identical transaction.

²³ In the case of *Sutherland v. United States*, U.S. Court of Appeals for the District of Columbia Circuit, No. 16,160 (1961), the physician in charge of one of the major departments of St. Elizabeths Hospital testified without contradiction that he was not seeing his patients "over once every two or three months" and that his examination of the patient in question was not as

It would seem, too, that if "the guiding hand of counsel" is not to be denied, counsel should provide an informed estimate of a client's chances of acquittal and the likelihood of leniency in sentencing upon a guilty plea and advise his client accordingly. See, e.g., Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204 (1956). Clients have traditionally depended on such advice. To deprive an accused of the right to follow the advice of counsel in these matters is to deprive him of a substantial personal benefit, traditionally linked to Sixth Amendment rights and never heretofore challenged in the courts.²⁴

complete as it should have been. See Joint Appendix, *Sutherland v. United States*, C.A., D.C. Cir. No. 16,160, pp. 76-77 (1961). It is noteworthy in this connection that the department described in the *Sutherland* case had a better physician-patient ratio than the department in which the petitioner in this case languished for almost a year as the result of his first commitment by the Municipal Court. In the *Sutherland* case, appellant, after a conviction in the trial court notwithstanding an insanity defense, was transferred to the Reformatory at Lorton, Virginia, during the pendency of his appeal. After this transfer he informed the Court of Appeals that the psychiatric facilities made available to him at Lorton were so much more satisfactory than those which had been made available to him at St. Elizabeths Hospital that he wished to have his appeal dismissed. His motion was granted.

The question must therefore be raised in all seriousness as to whether counsel, engaged in the defense of a client, entitled to an insanity defense, are not entitled, nay, even required to inform their client of the varying quality of psychiatric care of penal and public psychiatric facilities to enable him to make a rational and free choice.

²⁴ Perhaps the most celebrated case highlighting the nature of such a benefit to a client is the Loeb-Leopold case of 1924. This Court will recall that as a matter of calculated strategy Clarence Darrow advised his clients to enter guilty pleas to charges of murder in the first degree. It seems plain that to have rejected the guilty pleas in that case would have deprived defendants of the benefit of the best legal judgment of the time, and, in all likelihood, of their lives as well. See WEINBERG, ATTORNEY FOR THE DAMNED, 23-24 (1957).

The denial of the right to enter a guilty plea on advice of counsel has been sought to be justified in the case at bar by reference to a purported supervening public interest. It is appropriate to point out, therefore, that it is Soviet and not American justice which requires a defendant's counsel to speak primarily for the interests of the state and only secondarily for those of the defendant. It is the view of Vyshinsky, one may recall, "that in presenting evidence in favor of a defendant . . . [the defense counsel] must proceed 'not from the interests of his client, but from the interests of the building up of socialism, from the interests of our state.'" I GZOVSKY & GRZYBOWSKI, *GOVERNMENT, LAW AND COURTS IN THE SOVIET UNION AND EASTERN EUROPE*, 561 (London, 1959).

American jurisprudence seems devoid of comparable sentiments. Cf. BUTLER, *LAWYER AND CLIENT*, 15-25, 68, 69 (1871); STEWART, *TRIAL STRATEGY*, 398 (1940); BEANEY, *RIGHT TO COUNSEL*, 59 (1955); FELLMAN, *THE DEFENDANT'S RIGHTS*, 121-124 (1958).

In a word, if the respondent were to prevail, the role of counsel in criminal proceedings would be significantly restricted to conform with novel conceptions of the public interest.²⁵

²⁵ The recent case of *Ex parte Hodges*, 166 Cr. App. 433, 314 S.W. 2d 581 (Tex. 1958) is illuminating.

Defendant, indicted for murder, announced ready for trial. Prosecuting counsel produced an affidavit that defendant was of unsound mind at the time of the crime. Instead of proceeding to trial upon the indictment, the Court impaneled a jury to pass exclusively upon the issue of defendant's sanity. Defendant's counsel "vainly protested the impaneling of a jury to pass only upon the issue of . . . [defendant's] sanity, [and] stated that he had announced ready for trial on the indictment for murder without raising the question of insanity and was not raising such question in his defense or in bar of prosecution." The jury, so impaneled, heard evidence solely addressed to the issue of defendant's sanity. A psychiatrist, called by prosecuting counsel,

One may inquire in all seriousness as to whether such restriction, if permitted by this Court, is then to stop at this point or whether it is to affect other activities of counsel, engaged in a criminal defense.²⁸

over the objection of defendant, testified that defendant had been insane as of the time of the crime charged in the indictment. The jury found the defendant insane as of the time of its deliberation but not insane as of the time of the crime. The defendant was then committed to a public mental hospital. On appeal from a dismissal of a habeas corpus petition, the defendant was held entitled to the writ. In the words of the Texas Court of Criminal Appeals:

"[T]he defendant has been deprived of his rights guaranteed by the Sixth Amendment to the Constitution of the United States . . . to the effective aid of counsel." Ex parte Hodges, supra, 314 S.W. 2d 581, at 584. (Emphasis supplied.)

²⁸ Will the time come when defendants, committed to a Government mental hospital for observation in anticipation of an insanity defense, will be denied the right of following the advice of counsel that they are not to cooperate in such an examination, and is it possible that counsel may be held in contempt for giving such advice in the face of a court order for a mental examination? In view of the fact that the United States District Court for the District of Columbia has entered a specific order, directing a defendant to cooperate with Government psychiatrists over the protest of his counsel, these questions do not seem at all idle or far-fetched. See *United States v. John S. Sweeney*, Criminal Case No. 466-60, U.S.D.C., D.C. (1960).

IV.

D. C. Code Ann. §34-301(d), as Amended, Providing for the Mandatory Commitment of Any Person Acquitted by Reason of Insanity, Is Violative of the Requirements of Due Process of Law and Its Application to Petitioner Deprived the Petitioner of Due Process in the Instant Case.

A. *The statute authorizes condemnation without hearing.*

The statute provides for mandatory commitment of all persons acquitted by reason of insanity. Commitment is thus not conditioned on a judicial finding that the defendant is at the time of the trial, and not just at the time of the act charged, mentally ill and socially dangerous. It affords the defendant no opportunity to show that, notwithstanding a previously existing pathological mental state, he is not at the time of the adjudication mentally ill or socially dangerous. The presumption of a continuing pathological mental state cannot be invoked to maintain the statute on constitutional grounds.

A verdict of not guilty by reason of insanity provides no rational basis for the arbitrary conclusion that the defendant presently suffers from a mental disorder of which the offense was a product. Since, under *Davis v. United States*, 160 U.S. 469 (1895), the defendant is entitled to acquittal by reason of insanity merely upon the basis of a reasonable doubt concerning mental illness, a finding of not guilty by reason of insanity cannot be equated with an affirmative finding of the existence of mental illness at any time. Accordingly, the presumption of a continuing pathological mental state, which might otherwise be entertained, is invalid. Such a presumption is not rational and hence not consistent with due process of law. See *Tot v. United States*, 319 U.S. 463 (1943).

Assuming *arguendo* the validity of a presumption of a continuing pathological mental state, the citizen, under §301, is not even afforded an opportunity of showing that he is no longer mentally ill as of the time of the intended commitment, or that, if ill, he is not socially dangerous.

As the law stands in the District of Columbia today, therefore, a man can be locked up indefinitely in a lunatic asylum without any finding that he is insane.²⁷

In sum, the statute deprives a citizen, guilty of no crime, of his liberty without an opportunity to be heard in advance of his commitment. Can it be doubted that such a deprivation is also a deprivation of due process of law?²⁸

²⁷ The fact that petitioner's hearing in Municipal Court was not formally denominated a commitment hearing can in no sense render its end results valid under the Constitution since governmental authority cannot be allowed to accomplish by indirection what it may not do directly. See, e.g., *Speiser v. Randall*, 357 U.S. 513, at 526 (1958); *Bailey v. Alabama*, 219 U.S. 219, at 239 (1910).

²⁸ See the language of this Court in *Powell v. Alabama*, 287 U.S. 45, at 64 (1932):

"It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'law of the land' is intended 'a law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions. In *Holden v. Hardy*, 169 U.S. 366, 389, 18 S.Ct. 383, 387, 42 L. Ed. 780, the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, *Galpin v. Page*, 18 Wall. 350, 368, 369, 21 L. Ed. 959, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants

A comparable statutory provision for civil commitment could and would be struck down as violative of due process of law. See *State v. Mullinax*, 364 Mo. 858, 269 S.W. 2d 72 (1954); *Barry v. Hall*, 98 F. 2d 222 (D.C. Cir. 1938).

It will not do to say that a criminal commitment law can accomplish what a civil commitment law may not. See *Speiser v. Randall*, 357 U.S. 513, at 526 (1957).

A statutory provision for mandatory commitment after an acquittal by reason of insanity, similar to §301, has in fact been invalidated as violative of due process in *Underwood v. People*, 32 Mich. 1 (1875). In the words of the Court:

"[T]he more serious difficulty is in the nature of the proceedings themselves. In the first place the prisoner is sent into confinement without any legal investigation into his condition at that time, when he may be perfectly sane, and when, having been acquitted, he is entitled to all the privileges of any innocent man. There may be a very long interval between the offense and the trial." *Id.*, at 5.

It will not "do to say in such a case that relief can be obtained afterwards by habeas corpus." *State v. Arnold*, 356 Mo. 661, 204 S.W. 2d 254, at 260 (1947).

The loss of liberty, without a hearing, even for one day, would seem intolerable under democratic justice. As a matter of practical fact, however, this Court may notice that habeas corpus petitions, challenging confinement at St. Elizabeths Hospital after an insanity acquittal, are gen-

all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' Citations to the same effect might be indefinitely multiplied, but there is no occasion for doing so."

erally not considered for many months. Overcrowding at St. Elizabeths Hospital makes the completion of a mental examination in anything less than ninety days impossible. See generally, JUDICIAL CONFERENCE OF THE D. C. CIRCUIT, PROCEEDINGS, May 26, 1960, 61-63 (1960).

Experience with recent cases indicates that active consideration of a habeas corpus petition is often deferred far beyond three months.

The following is illustrative. A defendant charged with the commission of a crime on July 20, 1959, was acquitted by reason of insanity in October of 1960. In May of 1961, the District Court for this Circuit refused to accord that defendant a hearing upon a habeas corpus petition on the ground that his action was "premature." *In the Matter of Whittaker*, H.C. 83-61 (U.S.D.C., D.C. 1961). When the defendant persisted by filing a fresh habeas corpus petition in October of 1961, the District Court refused even to issue a writ to inquire into the defendant's sanity. *In the Matter of Whittaker*, H.C. 252-61 (U.S.D.C., D.C. 1961).²⁹

²⁹ The case is now in the United States Court of Appeals for this Circuit. See *Whittaker v. Overholser*, No. 16,481. No corrective action by the Court of Appeals in this particular case is likely to bring about a significant change in the delay between acquittal by reason of insanity and active consideration of a defendant's release under existing conditions.

Moreover, having been deprived of his liberty upon the ground that there was some reasonable doubt as to his sanity, the beneficiary of an insanity acquittal is vouchsafed his release on habeas corpus only if he can prove beyond a reasonable doubt that he has recovered his sanity and that he will not in the reasonable future be dangerous to himself or others. See *Overholser v. Russell*, *supra*; *Ragsdale v. Overholser*, *supra*.

B. Application of the statute on the basis of a discretionary invocation of the insanity defense by the Municipal Court provides no ascertainable standards in bar of arbitrary action.

The Municipal Court invoked the insanity defense upon the basis of a mere psychiatric certification.

In upholding such action the United States Court of Appeals for the District of Columbia Circuit did not see fit to enunciate any ascertainable standard for judicial action to effect the loss of liberty of the defendant by criminal commitment.

No specific or definite act was provided as a basis for the initiation of commitment to a mental hospital under the auspices of the D. C. statute, as thus interpreted.

One might say, as did this Court in *United States v. L. Coken Grocery Co.*, 255 U.S. 81, at 89 (1921), that the rule thus created, "leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

Which citizen is to be afforded the "benefit" of the insanity defense authorized under *Lynch*? Is it to be the traffic violator or the citizen who has spat upon a sidewalk? Is it to be the robber, the arsonist or the businessman who has engaged in a violation of the antitrust laws? Is it to be the vagrant, the political or religious heretic, or the "subversive"? And is such an insanity defense to be invoked upon the basis of a psychiatric letter suggestive of major or of minor mental illness or upon the basis of a letter written by a disaffected spouse, co-worker or the village gossip?

Lynch provides an infinity of possibilities without in any way providing notice as to what it is that one should be on guard against to escape the "benevolent" working of an insanity defense which is calculated to result in one's loss of freedom by confinement in a lunatic asylum. *Lynch*, moreover, provides no safeguard that judicial authority in this context will not be used "with an evil eye and an unequal hand." *Fick Wo v. Hopkins*, 118 U.S. 356, at 373-74 (1886).

V.

Even if the Extraordinary Procedures in this Case Were Found to Be Consistent With Due Process of Law, the Confinement of Petitioner Within the Mental Hospital Facilities Described Above Would Violate Due Process of Law in Its Own Right.

Inadequacy of treatment within the context of enforced hospital confinement in a case such as this is conducive not solely to the creation of an atmosphere of bitterness and despair, but also to the deprivation of due process guaranteed under the Fifth Amendment to the Constitution.

It is submitted that the forcible commitment of an individual acquitted by reason of insanity to a mental hospital or indeed the forcible commitment of any individual to a mental hospital is constitutionally justifiable only upon the assumption that that individual will receive needed psychiatric treatment and rehabilitation. Lack of adequate psychiatric treatment may mean confinement for life of patients who are curable. Thus, the tolerance of inadequate treatment facilities creates a situation in which a citizen, guilty of no crime, can be incarcerated in a mental hospital

for life.³⁰ The time has come to speak of "medical due process" in this context. See Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L. J. 1178 at 1203 (1947).

The fact that the requirements of due process of law have not as yet been authoritatively defined as *requiring* adequate psychiatric treatment as a condition precedent to any continued form of enforced psychiatric hospitalization does not militate against the conclusion that such should be the demand of due process in our day. See, e.g., testimony of Dr. Morton Birnbaum in I HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS OF THE COMMITTEE ON THE JUDICIARY, U. S. SENATE, 87th Cong., 1st Sess. 273 (1961).

As expressed by Mr. Justice Frankfurter for this Court:

"[B]asic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in

³⁰ In this light the enactment of the mandatory commitment clause of D. C. law in the absence of adequate treatment facilities within the District raises serious doubts concerning its constitutionality.

It is fitting in this connection to recall the warning uttered by one of the leaders of contemporary criminal law reform and in the integration of the law and the behavioral sciences. As seen by the late Professor George H. Dession, a "healthy penal adjustment" in the individualization of the treatment of the social misfit requires material and human resources of an order we have not yet accustomed ourselves to expend. "Failing . . . [such an] adjustment," inveighed Professor Dession, "the professing of policies of rehabilitation . . . can mean nothing more nor less than a scrapping of those rather precious, if imperfect, guarantees of individual liberty which represent a substantial percentage of the profits of centuries and which are summed up in the maxim 'Nulla Poena Sine Lege.'" Dession, *Psychiatry and the Conditioning of Criminal Justice*, 47 YALE L. J. 319, at 340 (1938).

its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." *Wolf v. Colorado*, 338 U.S. 25, at 27 (1949).

Protection of the right to treatment, as essential to ordered liberty, can be further justified in this context by reference to the progress of the free world in this field. It is this country which has lagged in securing to the mental patient humane conditions of confinement. The World Health Organization in reporting on a survey of existing legislation in other countries has had occasion to observe that "in addition to seeing that patients are not unjustifiably detained . . . [an] inspectorate is . . . concerned [in many countries] with insuring that patients are properly treated. To this end inspectors . . . are allowed access to hospitals at any time and patients and their relatives are permitted to approach them with complaints. Details of the treatment provided are also recorded and the inspectors have access to such records . . . " ³¹

Moreover, our failure to insist upon the right to treatment as a condition precedent to any form of enforced confinement in a mental hospital tends to support a system of preventive or protective custody—mere penal incarceration—of persons not found guilty of any crime. Such a system is inconsistent with the ideals of a government that proclaims itself to be a government of laws and not of men. It is irreconcilable with ordered liberty. It has hitherto been encountered solely in the framework of the totalitarian state.

³¹ WORLD HEALTH ORGANIZATION, HOSPITALIZATION OF MENTAL PATIENTS, A SURVEY OF EXISTING LEGISLATION 77 (Geneva, 1955).

As expressed by Fahy, J., concurring, in *Ragsdale v. Overholser*, 281 F. 2d 943, at 950 (D.C. Cir. 1960), absence of adequate psychiatric treatment tends to "transform the hospital into a penitentiary where one could be held indefinitely for no convicted offense, and this even though the offense of which he was previously acquitted because of doubt as to his sanity might not have been one of the more serious felonies."

VI.

Congress Has Provided No License for the Forcible Imposition of an Insanity Defense Upon the Petitioner.

The statutory enactment, underlying the petitioner's commitment to St. Elizabeths Hospital, i.e., D. C. Code Ann. §24-301(d), as amended, properly construed, applies only to defendants who affirmatively raise the insanity defense.

The language of the legislative rationale for the enactment, contained in both Senate and House Reports, strongly suggests that the condition precedent to mandatory commitment was to be nothing short of the affirmative invocation of the insanity defense:

"Where the accused has *pleaded* insanity, as the defense to a crime, and the jury has found that the defendant was, in fact, insane at the time the crime was committed, it is just and reasonable in the Committee's opinion that the insanity, once established, should be presumed to continue and that the accused should automatically be confined for treatment until it can be shown that he has recovered." Senate Report No. 1170, 84th Cong., 1st Sess. (1955); House Report 892, 84th Cong., 1st Sess. (1955). (Emphasis supplied.)

It is common learning that the statutory enactment was prompted by congressional concern over the possibility that dangerous criminals might secure freedom to prey upon the public under the liberalized rule of insanity governing criminal proceedings adopted in the District of Columbia. See *Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954).

It is self-evident that Congress knew of no single instance in which an insanity defense had not been freely elected by a defendant himself.

Moreover, as explained by Fahy, J., dissenting in the instant case, the accompanying statutory enactment, i.e., D. C. Code Ann. §24-301(e), governing release from hospital confinement after an insanity acquittal, read *in parimateria* with the commitment clause, cannot reasonably be interpreted as being addressed to "persons who have engaged in any kind of unlawful conduct, however minor, but only . . . [to] persons who have engaged in unlawful conduct of a dangerous character." *Overholser v. Lynch*, 288 F. 2d 388, at 397 (1961). Patently petitioner in the case at bar does not fall into the latter category.

VII.

Aside From the Above Considerations, Petitioner's Commitment Should Be Set Aside Under the General Supervisory Power of This Court as Inconsistent With the Enlightened Administration of Justice in the Federal Courts.

The supervisory power of this Court may be invoked in the case at bar to prevent not only a manifest injustice to petitioner but to safeguard the rational and efficient administration of justice in the federal courts. Cf. *McNabb v. United States*, 318 U.S. 332 (1943).

It is submitted that aside from all constitutional and statutory considerations, the procedure by which the Municipal Court effected the commitment of petitioner cannot commend itself to this Court as a proper exercise of judicial power and that repetition of commitment by such means should be prevented.

The supervisory power of this Court, moreover, may extend to prevent the stultification of the insanity defense, threatened by the opinion now under review.

When in 1954 the United States Court of Appeals for the District of Columbia Circuit announced a new test of criminal responsibility in *Durham v. United States*, 214 F. 2d 862 (D.C. Cir. 1954), it set in motion a wholesome trend in legal-psychiatric collaboration. This trend is about to be reversed under *Lynch*.

The Durham Rule has been followed by a significant body of jurisprudence in this Circuit. The case law created since that time has highlighted the need for an increased number of psychiatric examinations to assure the fair and rational administration of criminal justice in the District. See generally Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 YALE L. J. 905 (1961). This case law has sparked, in turn, a trend toward the increasing use of psychiatric examinations in criminal cases in the District of Columbia,³² a trend exemplified in other jurisdictions by such wholesome innovations as the Briggs Law in Massachusetts. See Mass. Ann. Laws, ch. 123, §100A (1955).

³² "Durham and its progeny have had a tremendous influence on the administration of criminal justice in the District of Columbia . . . There are now more frequent pretrial psychiatric examinations; in major criminal cases, a mental examination is becoming routine." Krash, *op. cit. supra*, at 950.

What can be anticipated if petitioner's commitment is permitted to stand is the rejection of any psychiatric exploration of an accused's mental state under public auspices by an increasing number of defense lawyers. The consequences are easy to foresee.

In converting the insanity defense from a shield of the accused into a sword of the prosecution, the Court of Appeals is effectively inhibiting the exploratory use of the mental examination by defendant's counsel.

Subverted by *Lynch*, it is the very humanitarian philosophy of *Durham* jurisprudence which accounts for the retrogression in question.

A word on some characteristic phases of pre-*Lynch* case law is therefore in order.

In 1959 the United States Court of Appeals for the District of Columbia Circuit appropriately ruled that public psychiatric authorities, conducting a mental examination to inquire into the competency of a defendant to stand trial, pursuant to D. C. Code Ann. §24-301(a), must extend the scope of the examination, upon request of either Government or defense, to include the defendant's mental state as of the time of the alleged crime. See *Winn v. United States*, 270 F. 2d 326 (D.C. Cir. 1959); *Calloway v. United States*, 270 F. 2d 334 (D.C. Cir. 1959). The Court of Appeals in that context was clearly and properly concerned with the adequacy of psychiatric examinations for indigent defendants. Cf. *Williams v. United States*, 250 F. 2d 19 (D.C. Cir. 1957); *Blunt v. United States*, 244 F. 2d 355 (D.C. Cir. 1957).

The general practice evolved both in the District and Municipal Courts since that time has been for the Court to order an examination of a defendant, if at all, both as to

competency and as to mental state as of the time of the crime.

A defense counsel, solely concerned with a question of competency in a given case, is thus today on notice that the mental examination, ordered by the District or Municipal Court, will go well beyond the question he has raised and that now, under *Lynch*, even if his client be determined to be competent to stand trial, any evidence of mental disorder uncovered in the course of the examination may be used against him to effect his loss of liberty.

These are not conditions conducive, at least as far as the defendant's counsel is concerned, to maximal invocation of exploratory psychiatric examinations under public auspices.

Avoidance by members of the practicing criminal bar of requests for mental examinations may well extend to situations involving a question of the defendant's competency to stand trial. Such a development would imperil the cause of the fair trial as well as the rational development of the insanity defense.

Durham, it has been appropriately observed, can be "viewed as an experiment in collaboration between law and medicine." Krash, *op. cit. supra*, at 951. That it is a promising experiment is widely conceded. See generally Watson, *Durham Plus Five Years: Development of the Law of Criminal Responsibility in the District of Columbia*, 116 AM. J. PSYCHIATRY 289 (1959); Sobeloff, *Insanity and the Criminal Law: From M'Naghten to Durham and Beyond*, 41 A.B.A. J. 793 (1955); Krash, *op. cit. supra*.

The reversal of *Lynch* is essential to the survival of *Durham* as such an experiment. In ordering such reversal this Court will secure the rights of the accused "by methods

that commend themselves to a progressive and self-confident society." *McNabb v. United States, supra*, at 344.

Conclusion

In sum, the petitioner's forfeiture of liberty under the circumstances described followed the transformation of his trial from one characteristic of the accusatorial to one characteristic of the inquisitorial system of litigation, significantly without the safeguards of the latter.

The petitioner has been denied the right of selecting his own trial strategy, available to any competent defendant; he has been denied effective assistance of counsel in the adversarial tradition, and was actually barred outright from following the advice he received from Court-appointed counsel in his case; he has lacked reasonable and effective notice as to what it was that he was called upon to defend himself against; he, as well as his counsel, have been unaware of the new role they were expected to play in the trial in which the usual and conventional positions were turned topsy-turvy and in which petitioner was not given an opportunity to be heard on the subject of his mental health; and petitioner has been condemned as insane under a standard of proof solely fit for Caesar's wife, i.e., upon the mere establishment of a reasonable doubt, however slight, concerning his mental health as of some past time.

It does not seem improper to suggest that in this process the prosecution succeeded in effecting the transformation of psychiatry into an instrumentality of oppression in the service of the Government.

By reason of the foregoing, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

RICHARD ARENS

2000 P Street, N. W.

Washington 6, D. C.

Counsel for Petitioner

Of Counsel:

RUFUS KING

Southern Building

Washington 5, D. C.

Dated: October 19, 1961

APPENDIX

D. C. Code Ann. §24-301 provides:

“(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

“(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating

him to be competent to stand trial, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial.

“(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

“(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

“(e) Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person

has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released under supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.*"

F.R.Cr.P., Rule 11 provides:

"A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED

DEC 8 1961

JOHN F. DAVIS, CLERK

No. 159

In the Supreme Court of the United States

OCTOBER TERM, 1961

FREDERICK C. LYNCH, PETITIONER

v.

**WINFRED OVERHOLSER, SUPERINTENDENT,
ST. ELIZABETHS HOSPITAL, WASHINGTON, D.C.**

**ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE RESPONDENT

ARCHIBALD COX,

Solicitor General,

BURKE MARSHALL,

Assistant Attorney General,

RICHARD J. MEDALIE,

Assistant to the Solicitor General,

HAROLD H. GREENE,

DAVID RUBIN,

Attorneys,

Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	1
Statutes and rule involved.....	3
Statement.....	3
Summary of argument.....	10
Argument.....	21
Introduction.....	21
I. The trial judge properly refused to permit petitioner to plead guilty.....	23
A. The trial judge has discretion on whether to accept a plea of guilty.....	24
B. The trial judge did not abuse his discretion in refusing to permit petitioner to enter pleas of guilty.....	31
C. The trial court's refusal to accept the pleas of guilty did not deprive petitioner of the effective assistance of counsel.....	35
II. Insanity is not simply an affirmative defense to be raised solely by the defendant; the issue may also be raised by the prosecution or by the court itself.....	36
III. Petitioner's commitment was authorized by statute.....	41
A. The provisions of the mandatory commitment statute require the commitment of all defendants found not guilty by reason of insanity, whether or not they themselves raised the insanity defense or desired to plead guilty.....	41
B. The provisions of the mandatory commitment statute apply to all defendants charged with crime and acquitted on the ground of insanity; no exception is made for defendants charged with non-violent misdemeanors.....	44
1. Petitioner is barred from raising the issue here.....	44
2. There is no merit to the claim....	45

Argument—Continued

IV. The statute under which petitioner was committed is constitutional.....	Page 49
A. Even though the mandatory commitment provision does not provide for a pre-commitment hearing or finding on the issue of actual insanity at the time of commitment, it does not violate the due process clause.....	49
1. The requirements of due process are not the same for proceedings resulting in punishment and those for commitment for care and treatment.....	49
2. A pre-commitment hearing after a verdict of acquittal by reason of insanity is not an essential element of due process.....	52
B. The constitutionality of the release provisions is not in issue in the present case.....	62
C. The standards for determining eligibility for release are consistent with due process.....	65
1. To qualify for release, a petitioner is properly required to establish that he is no longer suffering from an abnormal mental condition.....	65
2. The burden of proof in a release proceeding is consistent with due process.....	69
3. It is not improper to rely on the judgment of the hospital authorities.....	72
V. There were no other constitutional infirmities at the trial or during petitioner's confinement.....	75
A. The claim that petitioner was deprived of his right to counsel is without merit....	75
B. The claim that petitioner did not have adequate notice of the proceedings is without merit.....	77

III

Argument—Continued

V. There were no other constitutional, etc.—Con.

C. The burden of proof at trial was consistent with due process.....	Page 79
D. Petitioner was not entitled under the Fifth or Sixth Amendments to the appointment of psychiatrists at government expense.....	80
E. Petitioner's confinement is not unconstitutional because of conditions at St. Elizabeths Hospital.....	85
Conclusion.....	88
Appendix.....	89

CITATIONS

Cases:

<i>Alexander v. United States</i> , 136 F. 2d 783.....	76
<i>American Surety Co. v. Baldwin</i> , 287 U.S. 156.....	55
<i>Arnold, Edward, Trial of</i> , 16 Howell State Trials 695.....	33
<i>Austin v. United States</i> , 19 F. 2d 127.....	85
<i>Bailey v. Anderson</i> , 326 U.S. 203.....	55
<i>Barry v. Hall</i> , 98 F. 2d 222.....	51
<i>Bistram v. United States</i> , 248 F. 2d 343.....	85
<i>Berger v. United States</i> , 295 U.S. 78.....	40
<i>Blocker v. United States</i> , 288 F. 2d 853.....	64
<i>In re Boyett</i> , 136 N.C. 415, 48 S.E. 789.....	54
<i>Bragg v. Weaver</i> , 251 U.S. 57.....	55
<i>Ex parte Brown</i> , 39 Wash. 160, 81 Pac. 552.....	54
<i>Brown v. Urquhart</i> , 139 Fed. 846, reversed on other grounds, 205 U.S. 179.....	54
<i>In re Bryant</i> , 214 La. 573, 38 So. 2d 245.....	51
<i>Calloway v. United States</i> , 270 F. 2d 334.....	32, 76
<i>Canada v. State</i> , 144 Fla. 633, 198 So. 220.....	28
<i>Canizio v. New York</i> , 327 U.S. 82.....	76, 77
<i>Carter v. United States</i> , 283 F. 2d 200.....	34
<i>Carter v. United States</i> , 350 U.S. 928.....	28
<i>Clark v. United States</i> , 259 F. 2d 184.....	36, 79
<i>Ex parte Clark</i> , 86 Kan. 539.....	54
<i>Commonwealth v. Belenaki</i> , 276 Mass. 35.....	84
<i>Commonwealth v. Cavanaugh</i> , 183 Pa. Super, 417, 133 A. 2d 288.....	28
<i>In re Crosswell</i> , 28 R.I. 137, 66 Atl. 55.....	51

Cases—Continued

	Page
<i>Crumpton v. United States</i> , 133 U.S. 361	85
<i>Cunningham v. State</i> , 55 Miss. 269	36
<i>Curry v. Overholser</i> , 287 F. 2d 137	54, 58, 73
<i>Davis v. United States</i> , 160 U.S. 469	12, 36
<i>DeMorse v. Overholser</i> , 137 F. 2d 686, certiorari denied, 320 U.S. 785	73
<i>De Mourez v. Swope</i> , 104 F. 2d 758	76
<i>Dorsey v. Gill</i> , 148 F. 2d 857, certiorari denied, 325 U.S. 890	76
<i>Douglas v. United States</i> , 239 F. 2d 52	33
<i>In re Dowdell</i> , 109 Mass. 387, 47 N.E. 1033	51
<i>Duignan v. United States</i> , 274 U.S. 195	45, 75
<i>Durham v. United States</i> , 314 F. 2d 862	22, 33, 41, 42, 44
<i>Edmonds v. United States</i> , 260 F. 2d 474, certiorari denied, 362 U.S. 977	40
<i>Edwards v. State</i> , 134 Tex. Cr. 153, 114 S.W. 2d 573 ..	29
<i>Ellis v. United States</i> , 142 U.S. 651	14, 54, 72
<i>Fisher v. United States</i> , 388 U.S. 463	11, 21
<i>Feller v. Overholser</i> , 268 F. 2d 732	54, 58, 88
<i>Gann v. Passer</i> , 164 F. 2d 113	76, 77
<i>Gardner v. State</i> , 140 Tex. Cr. 237, 144 S.W. 2d 294 ..	31
<i>Georhart v. United States</i> , 372 F. 2d 499	34
<i>Goldley v. United States</i> , 160 U.S. 70	85
<i>Greenwood v. United States</i> , 350 U.S. 336	56
<i>Griffin v. Illinois</i> , 351 U.S. 12	20, 85
<i>Griffin v. United States</i> , 236 U.S. 704	21, 22
<i>Hall v. Verdell</i> , 60 F. Supp. 941	52
<i>Hamilton v. Alabama</i> , O.T. 1961, Nov. 13, 1961	77
<i>Hammou v. Hill</i> , 228 Fed. 999	51, 52
<i>Hannah v. Larche</i> , 363 U.S. 420	49
<i>Harris v. State</i> , 76 Tex. Cr. 126, 172 S.W. 975	29
<i>Harschman v. State</i> , 232 Ind. 618, 115 N.E. 2d 501	28
<i>Trial of James Hadfield</i> , 27 Howell State Trials 1281 ..	53
<i>Hiett v. Gann</i> , 170 F. 2d 473, certiorari denied, 337 U.S. 939	76, 77
<i>Hiett v. Swope</i> , 240 Iowa 300, 36 N.W. 2d 432	51
<i>Hirabayashi v. United States</i> , 339 U.S. 81	55
<i>Hodison v. Rogers</i> , 127 Kan. 950, 23 P. 2d 491	55
<i>Holloway v. United States</i> , 148 F. 2d 665, certiorari denied, 334 U.S. 852	11, 33
<i>Hopt v. Utah</i> , 110 U.S. 574	34

Cases—Continued

	Page
<i>Hough v. United States</i> , 271 F. 2d 458.....	50, 68
<i>Husty v. United States</i> , 282 U.S. 694.....	75
<i>Interstate Commerce Commission v. Louisville & N. R. Co.</i> , 237 U.S. 88.....	49
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11.....	55
<i>Kercheval v. United States</i> , 274 U.S. 220.....	28, 34
<i>The King v. Ingelson</i> , 1 K.B. 512.....	28
<i>In re Lambert</i> , 134 Cal. 626, 66 Pac. 851.....	51
<i>Lawn v. United States</i> , 355 U.S. 339.....	44, 75
<i>In re Le Donne</i> , 173 Mass. 550, 54 N.E. 244.....	51
<i>Leland v. State of Oregon</i> , 343 U.S. 791.....	18, 70, 80
<i>Lewis v. Overholser</i> , 274 F. 2d 592.....	58
<i>Liverpool, N.Y. & P.S.S. Co. v. Commissioners</i> , 113 U.S. 33.....	63
<i>In re Mast</i> , 217 Ind. 28, 25 N.E. 2d 1003.....	51
<i>Matz v. People</i> , 133 Colo. 45, 291 P. 2d 1059.....	31
<i>McGarty v. O'Brien</i> , 188 F. 2d 151, certiorari denied, 341 U.S. 928.....	82, 84
<i>McJordan v. Huff</i> , 133 F. 2d 408.....	76
<i>McMahon v. Mead</i> , 30 S.D. 515, 139 N.W. 122.....	51
<i>Minnesota ex rel. Pearson v. Probate Court</i> , 309 U.S. 270.....	59, 87
<i>O'Beirne v. Overholser</i> , 287 F. 2d 133.....	49
<i>O'Hara v. United States</i> , 129 Fed. 551.....	85
<i>Opinion of Justices</i> , 9 Allen 385 (Mass.).....	29
<i>Opp Cotton Mills, Inc. v. Administrator</i> , 312 U.S. 126.....	49
<i>Orencia v. Overholser</i> , 163 F. 2d 763.....	54
<i>In re Ostatter</i> , 103 Kan. 467, 175 Pac. 377.....	55
<i>Overholser v. DeMarcos</i> , 149 F. 2d 23, certiorari denied, 325 U.S. 860.....	72, 73
<i>Overholser v. Leach</i> , 257 F. 2d 667, certiorari denied, 359 U.S. 1013.....	15, 57, 58, 64, 66, 67, 69
<i>Overholser v. O'Beirne</i> , decided Oct. 19, 1961.....	45, 50, 53, 54, 58, 59, 62, 64, 66, 68, 87
<i>Overholser v. Russell</i> , 283 F. 2d 195.....	45, 47, 48, 66
<i>Patton v. United States</i> , 281 U.S. 276.....	28
<i>Payne v. Arkobauer</i> , 190 Ark. 614, 80 S.W. 2d 76.....	51
<i>Peabody v. Baker</i> , 59 Misc. 359, 110 N.Y. Supp. 848.....	54
<i>Pee v. United States</i> , 274 F. 2d 556.....	49
<i>People v. Banning</i> , 329 Mich. 1, 44 N.W. 2d 841.....	31

Cases—Continued

	Page
<i>People v. Chapman</i> , 301 Mich. 584, 4 N.W. 2d 18.....	60
<i>People v. Dubina</i> , 304 Mich. 363, 8 N.W. 2d 99, certiorari denied, 319 U.S. 766.....	54, 70
<i>People v. Dubina</i> , 311 Mich. 482, 18 N.W. 2d 902.....	70
<i>People v. Morrison</i> , 348 Mich. 88, 81 N.W. 2d 667.....	28
<i>People ex rel. Penbody v. Chanler</i> , 133 App. Div. 159, 117 N.Y.S. 322, affirmed, 199 N.Y. 525, 89 N.E. 1109.....	54
<i>People ex rel. Romano v. Thayer</i> , 229 App. Div. 687, 242 N.Y.S. 289.....	72
<i>Peoph. Scofield</i> , 142 Mich. 221, 105 N.W. 610.....	28
<i>People ex rel. Sullivan v. Wendel</i> , 33 Misc. 496, 68 N.Y.S. 948.....	51
<i>Plummer v. United States</i> , 260 F. 2d 729.....	36, 79
<i>Pope v. State</i> , 58 Fla. 81, 47 So. 487.....	28, 29
<i>Ragdale v. Overholser</i> , 261 F. 2d 913.....	14,
17, 43, 45, 52, 54, 56, 58, 66, 68, 69, 78	
<i>Ex parte Rath</i> , 143 Wash. 65, 254 Pac. 466.....	72, 73
<i>In re Reed</i> , 158 F. 2d 323.....	76
<i>Regina v. Kemp</i> , 3 W.L.R. 724.....	39
<i>Rez v. Bastien</i> , 42 Cr. App. 75.....	38
<i>Rez v. Garrigan</i> , 4 D.L.R. [1937] 344.....	39
<i>Rez v. Nott</i> , 43 Cr. App. R. 8.....	39
<i>Rez v. Oliver</i> , 6 Cr. App. 19.....	37
<i>R. v. Ricott</i> , 34 Cr. App. R. 87.....	27, 30
<i>In re Rosenfield</i> , 157 F. Supp. 18, reversed, 262 F. 2d 34.....	64
<i>Rucker v. United States</i> , 260 F. 2d 623, 268 F. 2d 146...	57
<i>Saylor v. Sanford</i> , 98 F. 2d 605.....	76
<i>Sater v. Welch</i> , 159 F. 2d 703, certiorari denied, 331 U.S. 849.....	76, 77
<i>Shapley v. Ochoa</i> , 258 Fed. 752.....	52
<i>Ex parte Shaplock</i> , 209 Cal. 420, 298 Pac. 769.....	54
<i>Simon v. Craft</i> , 183 U.S. 427.....	51
<i>Appeal of Sloop</i> , 147 Mo. 302, 87 A. 2d 115.....	51
<i>Starr v. United States</i> , 264 F. 2d 377, certiorari denied, 359 U.S. 936.....	66, 67
<i>State v. Bartlett</i> , 43 N.H. 224.....	37
<i>State v. Billings</i> , 55 Minn. 467, 57 N.W. 206.....	51
<i>State v. Burris</i> , 169 La. 520, 125 So. 580.....	55
<i>State ex rel. Fuller v. Mullinax</i> , 364 Mo. 858, 269 S.W. 2d 72.....	51
<i>State v. Hardy</i> , 339 Mo. 897, 98 S.W. 2d 593.....	27, 29

Cases—Continued

	Page
<i>State v. Kaufman</i> , 51 Iowa 578, 2 N.W. 275.....	28
<i>State v. McManus</i> , 187 La. 9.....	84
<i>State v. Reali</i> , 26 N.J. 222, 139 A. 2d 300.....	28
<i>State v. Saffron</i> , 146 Wash. 202, 262 Pac. 970.....	54
<i>State v. Stacy</i> , 43 Wash. 2d 358, 261 P. 2d 400.....	28
<i>Stewart v. Overholser</i> , 186 F. 2d 339.....	58
<i>Tatem v. United States</i> , 275 F. 2d 894.....	58
<i>Tatum v. United States</i> , 190 F. 2d 612.....	36, 44, 79
<i>Thompson v. King</i> , 107 F. 2d 307.....	76
<i>Thompson v. State</i> , 127 Tex. Cr. 494, 77 S.W. 2d 538..	29
<i>Thompson v. State</i> , 159 Neb. 685, 68 N.W. 2d 267....	55
<i>Tomlinson v. United States</i> , 93 F. 2d 652, certiorari denied, 303 U.S. 646.....	30
<i>Tot v. United States</i> , 319 U.S. 463.....	57, 62
<i>Underwood v. People</i> , 32 Mich. 1, 20 Am. Rep. 633....	54
<i>United States v. Baldi</i> , 192 F. 2d 540.....	85
<i>United States v. Echols</i> , 253 Fed. 862.....	27
<i>United States v. Lawrence</i> , No. 15,577, 26 Fed. Cas. 887.....	53
<i>United States v. Raines</i> , 362 U.S. 17.....	63, 64
<i>United States ex rel. Smith v. Baldi</i> , 344 U.S. 561..	35, 81, 84
<i>United States v. Byozoski</i> , 144 F. Supp. 806.....	27
<i>United States v. Strickland</i> , Crim. No. 374-59 (D.D.C.) unreported.....	37
<i>United States v. Trinder</i> , 1 F. Supp. 659.....	26
<i>United States v. Valdez</i> , 229 F. 2d 145, certiorari de- nied, 350 U.S. 906.....	85
<i>United States v. Van Duzee</i> , 140 U.S. 169.....	85
<i>United States ex rel. Weber v. Ragen</i> , 176 F. 2d 579, certiorari dismissed, 338 U.S. 809.....	35
<i>In re Wellman</i> , 3 Kan. App. 100, 45 Pac. 726.....	51
<i>West v. Gammon</i> , 98 Fed. 426.....	29
<i>Wilfong v. Johnston</i> , 156 F. 2d 507.....	76
<i>Williams v. District of Columbia</i> , 147 A. 2d 773.....	79
<i>Williams v. State</i> , 89 Okla. Cr. 95, 205 P. 2d 524.....	29
<i>Williams v. Swope</i> , 186 F. 2d 897.....	76, 77
<i>Williams v. United States</i> , 250 F. 2d 19.....	33, 34
<i>Winn v. United States</i> , 270 F. 2d 326, certiorari denied, 365 U.S. 848.....	32, 34, 76
<i>Yakus v. United States</i> , 321 U.S. 414.....	55
<i>Yankulov v. Bushong</i> , 80 Ohio App. 497, 77 N.E. 2d 88..	69
<i>Yantis v. State</i> , 95 Tex. Cr. 541, 255 S.W. 180.....	30

VIII

Constitution, Statutes and Rules

Constitution:

Fifth Amendment.....	2, 13, 80, 84
Sixth Amendment.....	75, 84

Statutes:

24 U.S.C. 211.....	41
Ark. Stat. Ann. § 59-242 (Supp. 1957).....	60
Colo. Rev. Stat. Ann. § 39-8-4 (Supp. 1957).....	60
Conn. Gen. Stat. § 2321(d) (Supp. 1955).....	60
21 D.C. Code § 306.....	6
D.C. Code § 22-1410.....	3, 89
D.C. Code § 24-301 (1951).....	42
D.C. Code (Supp. VIII) 1960, § 24-301.....	2,
6, 8, 15, 16, 22, 59, 61, 62, 88, 90	
D.C. Code § 24-301(a).....	3, 4, 90
D.C. Code (Supp. VIII) 1960, § 24-301(b).....	49, 91
D.C. Code (Supp. VIII) 1960, § 24-301(c).....	91
D.C. Code (Supp. VIII) 1960, § 24-301(d).....	2,
6, 7, 9, 12, 13, 17, 41, 44, 46, 65, 91	
D.C. Code (Supp. VIII) 1960, § 24-301(e).....	13,
17, 46, 47, 65, 91	
D.C. Code (Supp. VIII) 1960, § 24-301(f).....	93
D.C. Code (Supp. VIII) 1960, § 24-301(g).....	17,
66, 69, 93	
D.C. Code (Supp. VIII) 1960, § 24-301(h).....	93
Del. Code Ann., Title 11, § 4702 (1953).....	60
Ga. Code Ann. § 27-1503 (1953).....	60
Hawaii Rev. Laws, 1955, § 258-38.....	60
Kan. Gen. Stat. Ann. § 62-1532 (1949).....	60
La. Rev. Stat. Ann. § 28.53 (1951).....	60
Me. Rev. Stat. Ann. Ch. 27, § 119 (1954).....	60
Mich. Stat. Ann. 28.9333(3) (1954).....	60
Minn. Stat. Ann. § 631.19 (Supp. 1960).....	60
N.M. Stat. Ann. § 41-13-3 (1954).....	60
Neb. Rev. Stat. 1943, § 29-2203 (Reissue of 1956).....	60
Nev. Rev. Stat. Ann. § 175.445 (1955).....	60
N.Y. Soc. Laws, 1960, Ch. 550, § 91-3.....	60
Ohio Rev. Code Ann. § 2945.39 (1953).....	60
Criminal Lunatics Act, 40 Geo. 3, c. 94 (1800).....	60, 62
Lunacy Act, 1890, 53-54 Vict., c. 5, Sec. 4 (1890).....	50
National Health Service Act, 1946, 9-10 Geo. 6, c. 81, Schedule 9 (1946).....	50
Pa. Stat. Ann., Title 19, § 1351 (1930).....	61

IX

Constitution, Statutes and Rules—Continued

Statutes—Continued		Page
S.C. Code Ann. § 32-927 (1960 Cum. Supp.)	-----	61
Trial of Lunatics Act, 46 & 47 (Vict.) c. 38, s. 2 (1883)	-----	57, 60, 62
V.I. Code Ann., § 5-3637 (1957)	-----	60
Wis. Stat. Ann. § 957.11 (1958)	-----	60
Rules:		
Rule 8 of the Municipal Court Criminal Rules	----	23
Rule 9 of the Municipal Court Criminal Rules	----	11, 24, 25, 30, 93
Rule 11 of the Federal Rules of Criminal Procedure	-----	25, 26, 27, 30
Rule 40(1)(d)(2) of the Rules of the Supreme Court	-----	75
Rule 28, Federal Rules of Criminal Procedure	----	85
Legislative Material:		
H. Rep. No. 892, 84th Cong., 1st Sess.	-----	43
S. Rep. No. 1170, 84th Cong., 1st Sess.	-----	42, 43, 60
Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on <i>Constitutional Rights of the Mentally Ill</i> , 87th Cong., 1st Sess.	-----	37, 40, 87
Miscellaneous:		
Royal Commission on Capital Punishment, Report, § 443, § 444 (1953)	-----	37, 39
Freund, <i>The Police Power, Public Policy and Constitutional Rights</i> , § 255 (1904)	-----	52
Kadish, <i>A Case Study In The Signification Of Procedural Due Process—Institutionalizing The Mentally Ill</i> , 9 W. Pol. Q. 93 (1956)	-----	49, 50, 51
Krash, <i>The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia</i> , 70 Yale L.J. 905, 906, 941, 942 (1961)	-----	22, 42
Lindman and McIntyre, <i>The Mentally Disabled and the Law</i> (1961)	-----	52, 53, 61, 73
Orfield, <i>Pleas in Federal Criminal Procedure</i> , 35 Notre Dame Law, 1, 2, 5 (1959)	-----	25, 26
Ross, <i>Commitment of the Mentally Ill, Problems of Law and Policy</i> , 57 Mich. L. Rev. 945	-----	52
Samuels, <i>Can the Prosecution allege that the Accused is Insane</i> , (1960) Crim. L. Rev. 453, 458	-----	38, 40

Miscellaneous—Continued

	Page
Spingarn, <i>St. Elizabeths Pace-Setter for Mental Hospitals</i> , 212 <i>Harpers</i> 58 (Jan. 1956).....	86
Weihofen and Overholser, <i>Commitment Of The Mentally Ill</i> , 24 <i>Tex. L. Rev.</i> 307.....	70, 72, 73
Weihofen, <i>Mental Disorder as a Criminal Defense</i> (1954).....	54, 64, 69, 70, 72
Wharton, <i>Criminal Law and Procedure</i> § 1911.....	31
Williams, <i>Criminal Law: The General Part</i> (London, 1953).....	37, 39, 53, 57, 62
Annot., 88 <i>A.L.R.</i> 1084.....	55
<i>Case and Comment</i> [1958] <i>Crim. L. R.</i> 382, 392.....	38
Comment, <i>Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration</i> , 68 <i>Yale L.J.</i> 293 (1958)...	53, 64, 69, 73
Comment, <i>The Right to Counsel in Misdemeanor Cases</i> , 48 <i>Calif. L. Rev.</i> 501 (1960).....	75
Note, <i>Constitutionality of Nonjudicial Confinement</i> , 3 <i>Stan. L. Rev.</i> 109 (1950).....	74
Washington Evening Star, November 22, 1961, p. B-1, col. 4.....	86

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH, PETITIONER

v.

**WINFRED OVERHOLSER, SUPERINTENDENT,
ST. ELIZABETHS HOSPITAL, WASHINGTON, D.C.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (R. 29-44) is reported at 288 F. 2d 388. No opinion was written by the district court.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1961 (R. 45). The petition for a writ of certiorari was filed on April 17, 1961, and granted on June 19, 1961 (R. 46). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a judge of the Municipal Court for the District of Columbia has jurisdiction to refuse to

accept a plea of guilty when the plea is made voluntarily with understanding of the nature of the charge.

2. Whether the trial judge abused his discretion by refusing to permit petitioner to plead guilty when it affirmatively appeared that there was grave doubt as to his sanity at the time of the commission of the offenses.

3. Whether, in a federal court, the issue of insanity at the time of the offense is exclusively within the province of the defendant to raise, ~~and~~ ^{and} evidence of insanity exclusively within his province to introduce.

4. Whether Section 24-301(d) of the D.C. Code, which provides for the commitment of defendants acquitted solely on the ground of insanity, is restricted in its application to defendants who affirmatively plead the insanity defense, plead not guilty, or are charged with crimes of violence.

5. Whether Section 24-301, providing for the commitment of a defendant acquitted on the ground of insanity without a special hearing or finding upon the issue of his insanity at the time of the commitment, but expressly reserving to the defendant the right to establish his eligibility for release in a habeas corpus proceeding, contravenes the due process clause of the Fifth Amendment.

6. Whether the Court should consider, and whether petitioner's trial or subsequent confinement was vitiated by, any of the following alleged constitutional infirmities suggested in this Court: lack of counsel at arraignment, alleged lack of notice of the nature of the proceedings, alleged invalidity of the burden of proof at trial, failure to receive private psychiatric

examination and testimony at government expense, and alleged inadequacy of treatment at St. Elizabeths Hospital.

STATUTES AND RULE INVOLVED

The applicable statutes and rule involved are set forth in the Appendix, *infra*, pp. ~~88-92~~ 89-93.

STATEMENT

1. On November 6, 1959, two informations (U.S. 7736-59 (R. 21-22) and U.S. 7737-59 (R. 25-26)) were filed in the Municipal Court for the District of Columbia, charging petitioner with violations of the District of Columbia bad check law (D.C. Code, § 22-1410, App., *infra*, p. 88).¹

On the day the informations were filed (R. 22, 26), petitioner waived counsel (R. 21, 25) and entered a plea of not guilty to each information (R. 19). Pursuant to Section 24-301(a) of the D.C. Code (App., *infra*, pp. ~~88-90~~), the court ordered petitioner committed to the District of Columbia General Hospital for a mental examination to determine his competency to stand trial (R. 21, 25; see R. 12).² Peti-

¹ Specifically, the informations charged that on October 21, 1959 (7736-59) and October 20, 1959 (7737-59) petitioner, with intent to defraud, made, drew, uttered and delivered checks in the amount of \$50.00 each, knowing that he did not have sufficient funds in the bank for payment (R. 21-22, 25-26).

² The record does not show why the court ordered a mental examination, i.e., whether there was "prima facie evidence" submitted to the court or whether the court acted on the basis of its own observations (see D.C. Code, § 24-301(a), App., *infra*, p. 89). In oral argument before the district court on the petition for habeas corpus, petitioner's counsel said that "he [peti-

4

tioner was admitted to the hospital on the same day (R. 23).

On December 4, 1959, the hospital, through its Assistant Chief Psychiatrist, reported (R. 23) that psychiatric examination had revealed petitioner "to be of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense." Stating that petitioner had "shown some improvement since his admission to this hospital," the report recommended "that he be committed to a psychiatric hospital for further care and treatment."* On December 28, 1959, the hospital, through the same psychiatrist, submitted a second report, which stated (R. 24) that petitioner had "shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense." The psychiatrist went on to state that, in his opinion, petitioner "was suffering from a mental disease, i.e., a manic depressive psychosis, at the time of the crime charged," and that "[s]uch an illness would particularly affect his judgment in regard to financial matters, so that the crime charged would be a product of this mental disease." The psychiatrist stated further that petitioner] came to the Municipal Court and apparently, upon prima facie evidence of some mental unsoundness being presented, he was transferred to the District of Columbia General Hospital for observation" (R. 12). Counsel, who was not present in the Municipal Court (R. 13), and whose statement was not sworn, did not indicate whether the "prima facie evidence" was submitted by petitioner or by the government.

* Upon receipt of the report, the trial judge, under the provisions of Section 24-301(a), ordered that petitioner remain at the hospital for treatment (R. 30).

tioner appeared "to be in an early stage of recovery from manic depressive psychosis. It is thus possible that he may have further lapses of judgment in the near future. It would be advisable for him to have a period of further treatment in a psychiatric hospital."

On the following day—December 29, 1959—petitioner, represented by an attorney appointed by the Municipal Court (R. 6, 23), was brought to trial (R. 21, 25). Petitioner then sought to withdraw the pleas of not guilty which he had previously entered and to enter pleas of guilty to the two informations (R. 19). The trial judge, who had before him copies of the hospital reports of December 4, 1959, and December 28, 1959, both of which were attached to one of the informations (R. 23, 24), refused to permit petitioner to change his pleas and proceeded to hear evidence on the charges (R. 19). During the course of the ensuing trial, a physician representing the District of Columbia General Hospital Psychiatric Division testified over petitioner's objection that the crimes with which petitioner was charged were the products of mental illness (R. 19).⁴ According to the findings of fact of the district court, "no testimony was offered by the petitioner either with respect to the offenses charged against him or his mental condition at the time said offenses were committed" (R. 19). According to the court of appeals, "[a]t the

⁴The district court, in the habeas corpus action, found that the testimony of the physician was offered by the government as part of its case in chief (R. 19). There is, however, no evidence in the record to support this finding.

trial, it appears that * * * [petitioner] took the stand and denied essential elements of the crimes with which he was charged" (R. 31). No support for either of these contradictory conclusions may be found in the present record.

At the conclusion of the case, the trial judge found petitioner "not guilty on the ground that he was insane at the time of the commission of the offense" (R. 9), and entered a judgment of acquittal by reason of insanity (R. 19). Pursuant to Section 24-301(d) of the D.C. Code (App., *infra*, p. 95), the judge ordered petitioner committed to St. Elizabeths Hospital (R. 9, 19, 20). No appeal was taken. (91)

2. On June 13, 1960, petitioner, represented by new counsel (R. 6), filed in the United States District Court for the District of Columbia a petition for a writ of habeas corpus (R. 3-6), attacking the legality of his confinement on the grounds (1) that the Municipal Court's refusal to permit him to plead guilty under the circumstances of the case deprived him of his liberty without due process of law; (2) that an "impossible burden" had been placed upon him to rebut the psychiatric evidence (of insanity) because the proof required for his commitment was evidence casting only the slightest reasonable doubt upon his sanity; (3) that his commitment violated "the safeguards of the civil commitment law embodied in Title 21, D.C. Code, Section 306 et seq."; (4) that his automatic commitment without evidence of, or a judicial finding of, present dangerousness (*i.e.*, dangerousness at the time of the commitment) deprived him of liberty without due process of law; and (5) that Section 24-301 of the D.C. Code was "unconstitutional on

its face and as construed and applied * * * because it failed to provide for a judicial finding, on competent and substantial evidence, of mental illness and dangerousness at the time of the trial or, in the alternative, for an immediate report back to the court with a full hearing within a few days after commitment to permit "a judicial finding of present social dangerousness requiring further treatment and deprivation of liberty in a mental institution." (R. 5). The petition also contained language which could be construed as alleging that Section 24-301(d) applies only to defendants who affirmatively raise the insanity defense (R. 5).

The district court permitted petitioner to proceed without prepayment of costs (R. 7) and ordered that the writ of habeas corpus issue (R. 6). Respondent's return and answer, filed on June 16, 1960 (R. 7-8), admitted that petitioner was confined in St. Elizabeths Hospital but denied that such detention was unlawful; stated that petitioner had failed to allege that respondent was acting arbitrarily or capriciously in failing to certify petitioner for release or that petitioner was of sound mind; declared that, during the period of petitioner's confinement in St. Elizabeths Hospital, he had been under the care and observation of the respondent, as well as other members of the medical staff of St. Elizabeths Hospital, skilled in the care, diagnosis and treatment of nervous and mental disorders, who were of the opinion that petitioner had "not recovered from his abnormal mental condition, to wit: Manic-Depressive Reaction, Manic Type"; and concluded that respondent was unable to

certify that petitioner would not be dangerous to himself or others in the reasonable future, by reason of his mental disorder.

After respondent had filed a supplemental return and answer (R. 10-11), proceedings were had in the district court on June 16, 1960, before Judge McGarraghy (R. 12-20). Petitioner's counsel introduced no evidence, but in oral argument recounted what he believed to have transpired in the Municipal Court (R. 12-13), and addressed himself to the legal issues raised by the habeas corpus petition. Counsel for respondent also presented argument to the court on the legal issues. During the course of the argument, the judge rejected petitioner's attack upon the constitutionality of the mandatory commitment procedures set up in Section 24-301 of the D.C. Code, stating that he thought those procedures were constitutional (R. 15). At the termination of the argument, however, the court concluded (R. 18):

I don't believe that the Municipal Court had a right to convert this proceeding into a civil commitment proceeding, which is what it did. Therefore, I don't think the Municipal Court had jurisdiction to commit him to St. Elizabeths. I will grant the writ.

On June 27, 1960, the district court entered an order stating its findings and concluding (R. 20) that "the Municipal Court lacked jurisdiction to effect such a commitment and thereby permit the government to obtain commitment of the petitioner as of unsound mind by use of a criminal proceeding in substitution for civil commitment procedures established by

law * * *"; accordingly the court ruled that petitioner was illegally detained at St. Elizabeths Hospital. An order was entered directing (R. 20) that petitioner be released unless civil commitment proceedings were instituted within ten days of the date of the order or such extension as the court might grant for cause shown, in which event petitioner was to remain in respondent's custody until final determination of the civil commitment proceedings.

3. Respondent appealed, and the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, reversed.* The majority of six judges (Bastian, Miller, Prettyman, Washington, Danaher and Burger, J.J.) held that it was discretionary with the trial judge to permit petitioner to substitute pleas of guilty for his original pleas of not guilty (R. 33-34); that such discretion was not abused in this case (R. 36); that mandatory commitment was proper even in the case of nonviolent crimes (R. 37); and that, once a person has been committed under Section 24-301(d) of the D.C. Code, the government should not thereafter be forced to prove his insanity as the price of continuing treatment since the person may establish his eligibility for release in habeas corpus proceedings (R. 38). With respect to factual questions raised by counsel in brief and argument as to what actually occurred in the trial court, the court of appeals noted that no reporter was present at the Municipal Court proceedings, but that this fact did

* Pending appeal, petitioner was conditionally released from St. Elizabeths Hospital (R. 35). On April 7, 1961, however, his conditional release was revoked (see Pet. Br. 8).

not in any way affect the jurisdiction of the Municipal Court to take the action challenged. The court of appeals concluded (R. 38): "A presumption of regularity attaches to the proceedings of a trial court in the absence of an appeal, and we are bound by that presumption, unless and until a showing has been made that the judgment is so defective as to be subject to collateral attack, under the rules applicable in *habeas corpus*."

In a dissenting opinion, Judge Fahy, with whom Judges Edgerton and Bazelon joined, did not reach the issue of the power of the Municipal Court to reject the guilty pleas, but thought that petitioner's commitment was invalid because the record did not show that he and his counsel were given a "reasonable opportunity" to cope with the testimony of the psychiatrist by showing that petitioner was not of unsound mind at the time of the commission of the offenses (R. 40). The dissenting judges also would have affirmed on the ground that, even if petitioner was validly committed, his continuing confinement was not authorized by statute (R. 41-44).

SUMMARY OF ARGUMENT

At issue in this case is the validity of the delicate balance struck by the Congress and the Court of Appeals for the District of Columbia Circuit, acting in their special spheres of responsibility as the legislature and the highest court of the District of Columbia, in the formulation and overseeing of the rules controlling criminal insanity in the District. The judgments of these bodies should be reviewed by this Court with great restraint. Only if their choices are

shown to be plainly invalid should the Court intervene. See *Fisher v. United States*, 328 U.S. 463, 476.

I

A. Rule 9 of the Municipal Court Criminal Rules, which is the exact replica of Rule 11 of the Federal Rules of Criminal Procedure, specifically provides that the court may refuse to accept a plea of guilty. Both the language of the Rule and its history refute petitioner's argument that the court's discretion to reject a guilty plea is limited to instances of a lack of voluntariness or understanding. Courts have long refused to accept a guilty plea when there is evidence that the defendant, notwithstanding his plea, is actually innocent. Evidence of a lack of capacity to commit the crime furnishes no exception.

B. The trial judge did not abuse his discretion in refusing to permit petitioner to plead guilty. The judge had before him substantial evidence that petitioner was of unsound mind at the time of the commission of the offenses. Acceptance of the guilty pleas would have resulted in the imposition of criminal punishment notwithstanding evidence that petitioner had not been responsible for his conduct. To overlook such evidence would have been to ignore the very basis of our criminal jurisprudence. "Our collective conscience does not allow punishment where it cannot impose blame." *Holloway v. United States*, 148 F. 2d 665 (C.A. D.C.).

C. Petitioner's contention that by refusing to accept his guilty pleas the trial court deprived him of the effective assistance of counsel does not merit serious consideration. A judge does not render coun-

sel's assistance, ineffective, and thereby transgress the bounds of the Sixth Amendment, merely by rejecting the proposition which counsel tenders.

II

As *Davis v. United States*, 160 U.S. 469, indicates, the prosecution, as well as the defendant, may raise the question, and offer evidence, of insanity. The prosecutor cannot in good conscience prove the commission of criminal acts but withhold evidence of a lack of responsibility.

III

A. There is no warrant for the contention that Section 24-301(d) of the D.C. Code, which requires the commitment of "any person tried upon an indictment or information for an offense," who "is acquitted solely on the ground that he was insane at the time of its commission," applies only to defendants who affirmatively raise the insanity defense or who plead not guilty. The words of the statute do not support this construction; and it would be wholly inconsistent with the purposes of the mandatory commitment provision—the protection of the public and the rehabilitation of the defendant—to create exceptions where the defendant elects not to raise the insanity defense or chooses to plead guilty.

B. Petitioner's contention that Section 24-301(d) should be construed not to apply to defendants charged with nonviolent misdemeanors was not made in the habeas corpus petition, not presented to the court of appeals, not made in the petition for certio-

rari, and should not be considered here. The claim, moreover, lacks merit. Subsection (d) authorizes the commitment of "any person" tried for "an offense" and acquitted by reason of insanity. The fact that subsection (e) provides for certification of eligibility for release by the superintendent only upon a finding that the person confined "will not be dangerous" has no bearing upon the category of persons committable under subsection (d). The fact that one must be "not dangerous" in order to be released does not necessarily imply that one must be "dangerous" in order to be committed. In any event, the court of appeals has properly held a person who passes bad checks to be "dangerous" within the meaning of subsection (e).

IV

A. 1. Petitioner claims that Section 24-301(d) contravenes the due process clause of the Fifth Amendment because it does not provide for a special pre-commitment hearing or finding on the issue of insanity at the time of commitment. But commitment is for the purpose of treatment, not punishment, and consequently the formal procedural rules which must be followed in criminal trials are not necessarily applicable here. Even in the area of civil commitment, formal pre-commitment proceedings are not required in some jurisdictions and a majority of the courts have held that involuntary commitment without notice or opportunity to be heard does not violate due process provided that the patient has the right, after commitment, to contest in a judicial proceeding the propriety of his confinement.

2. Courts have held generally—and in modern times uniformly—that a defendant acquitted by reason of insanity is not deprived of his liberty without due process of law by commitment to a mental hospital without further hearing on the issue of his sanity at the time of the commitment, if he has means available for thereafter securing his release upon a showing that he has recovered his sanity. These holdings are consistent with this Court's view that the object of a writ of habeas corpus "is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment." *Ekin v. United States*, 142 U.S. 651, 662.

3. The fact that in the District of Columbia a verdict of not guilty by reason of insanity must be returned where the trier of fact has no more than a reasonable doubt ~~of the~~ defendant's sanity does not render the defendant's commitment constitutionally invalid. Congress faced the problem that, if it imposed lax commitment standards, juries would be chary of acquitting defendants on the ground of insanity because of a reluctance to jeopardize the security of the citizens of the District of Columbia. The Congressional choice in this delicate area is not so irrational as to offend due process, particularly since the commitment standard parallels the standard for acquittal by reason of insanity.

In *Ragsdale v. Overholser*, 281 F. 2d 943 (C.A.D.C.), Section 24-301 was sustained as against the conten-

tion presented here. The court in that case pointed out that implicit in a verdict of not guilty by reason of insanity is the conclusion that the defendant committed the offense charged and that there is a rational basis for the belief that he suffered from a mental disorder of which the offense was a product; that Congress might well have concluded that a hearing immediately after the verdict to determine the defendant's then mental condition would be meaningless because psychiatrists would not have had a reasonable opportunity to subject him to observation and examination and to report their findings; that it is not unreasonable to refuse to permit the defendant to remain at large while psychiatrists were attempting to determine whether he was dangerous, since a premature release could lead to the commission of new criminal acts; and that the defendant may judicially test the legality of his confinement in habeas corpus proceedings.

4. In formulating procedures to be followed after a verdict of not guilty by reason of insanity, Congress is not constitutionally required to duplicate the procedures which are established for civil commitment. Those who have committed anti-social acts forbidden by law and have been found not guilty by reason of insanity constitute an "exceptional class of people" (*Overholser v. Leach*, 257 F. 2d 667, 669 (C.A.D.C.), certiorari denied, 359 U.S. 1013) who can be dealt with separately.

It is unnecessary, in order to sustain the constitutionality of Section 24-301, to presume from the verdict of not guilty by reason of insanity that the de-

fendant is insane at the time of the commitment. The only presumption which it is necessary to make from that verdict—embodying a finding of the commission of an act proscribed by law and some rational doubt of sanity—is that the defendant *may* still be dangerous, a perfectly permissible inference.

B. Insofar as petitioner attacks the release provisions of Section 24-301 as those provisions have been interpreted by the court of appeals, his contentions should not be considered. Petitioner has never claimed that he is eligible for release because he is of sound mind, but attacks his detention solely on the ground that his commitment was invalid. The issue, therefore, is the validity of his initial commitment—not of the standards governing eligibility for release. The commitment is defended, in part, upon the ground that habeas corpus is subsequently available. But if the general availability of habeas corpus proceedings with constitutionally sufficient safeguards would validate the commitment, it would be inappropriate, in advance of a specific habeas corpus proceeding testing the particular petitioner's eligibility for release, to invalidate a particular commitment upon the ground that in *other* cases the standards applied in release proceedings have not met constitutional requirements. This Court has rigidly adhered to the rule that it will never anticipate a question of constitutional law in advance of the necessity of deciding it or formulate a rule of constitutional law broader than is required by the facts to which it is to be applied.

C. 1. In any event, the release provisions of Section 24-301, as construed by the court of appeals, are con-

91-93
 sistent with due process. The court of appeals has held that, in the absence of a certificate from the superintendent of the hospital in which a person committed under subsection (d) is confined that such person has recovered his sanity and will not be dangerous to himself or others (see subsection (e), App., *infra*, pp. 30-32), such person, in exercising his right to petition for a writ of habeas corpus under subsection (g), must show (1) that he has recovered his sanity and (2) that such recovery has reached the point where he has no abnormal mental condition which in the reasonably foreseeable future would give rise to danger to himself or to the public in the event of release. This is a reasonable standard. The concept of "abnormal mental condition" allows for the fact that recovery from a behavior disorder does not come overnight, and that a patient may progress from what is indisputably a "mental disease" to a condition which cannot be so labeled but nevertheless exposes himself or others to danger. The test of legal responsibility for crime is not necessarily the proper test for determining whether commitment should continue; indeed, application of the responsibility test may lead to premature release.

2. The court of appeals has also ruled that the petitioner must show that the refusal of the superintendent to issue a certificate under subsection (e) is arbitrary and capricious, and has stated that "the doubt if reasonable doubt exists about danger to the public or the patient, cannot be resolved so as to risk danger to the public or the individual." *Ragsdale v. Overholser*, 281 F.2d 943, 947.

There can be no constitutional barrier to placing such a burden on the patient to establish his eligibility for release. Release after acquittal by reason of insanity generally requires a stronger showing of restoration to sanity than would be appropriate in a noncriminal case, and the person confined in a mental institution pursuant to such an acquittal normally has the burden of proof on that issue. The fact that the burden of proof may be less favorable in the District of Columbia than in some other jurisdictions is not dispositive of the constitutional issue. In *Leland v. State of Oregon*, 343 U.S. 791, a capital case, the Court sustained, as against due process objections, an Oregon statute which, alone among state statutes, required the accused, on a plea of insanity, to establish that defense beyond a reasonable doubt.

3. Courts have long been aware that they assume a great responsibility in ordering the discharge of a person who, in the opinion of the superintendent of the institution to which the person has been committed, should not be at large for reasons of public safety. The hospital authorities who have the person under daily supervision and to whom his history and condition are most familiar are best qualified to exercise the major responsibility for discharging patients. Courts, moreover, are ill-equipped to make medical findings.

V

There were no other constitutional infirmities either in petitioner's trial or in his subsequent confinement.

A. The *amicus*, but not petitioner, urges that the proceedings in the Municipal Court were invalid because petitioner did not have counsel at arraignment. This issue, never presented to or passed upon below, should not be considered here. In any event, the argument is without merit since petitioner had counsel appointed before trial and was not prejudiced in any way by the absence of counsel at arraignment.

B. Petitioner's argument that he "had no formal notice that his hearing upon a criminal charge would be transformed into a hearing upon his sanity" (Pet. Br. 24) should not be considered because it was not presented to the district court in the habeas corpus petition. The contention also lacks merit, for there is nothing in the record to show that the hearing was transformed into an inquiry concerning petitioner's sanity at the time the checks were cashed. The judgment of acquittal by reason of insanity implies that the government offered evidence of, and proved beyond a reasonable doubt, the commission of acts forbidden by law. Thus, the question of insanity was but one of the issues at petitioner's criminal trial. There is nothing in the record to show that petitioner was surprised by the refusal of the trial judge to accept his plea of guilty, or by the fact that the physician was called to the stand, or by the testimony of the physician. The hospital report indicating that petitioner was of unsound mind was part of the record; prior decisions of the Court of Appeals for the District of Columbia Circuit suggested that the court might refuse to accept the guilty pleas; and there was precedent in the

U

Municipal Court for the refusal to accept the pleas. No claim of surprise was made, nor was a continuance requested.

C. Petitioner urges that the burden of proof at trial was inconsistent with due process requirements because, if he were to prevail in his desire to be convicted rather than acquitted, he would have had to establish his sanity beyond a reasonable doubt. This argument, however, is merely a restatement, in a different form, of the argument that it is unconstitutional to commit a defendant found not guilty by reason of insanity where the verdict implies only a reasonable doubt of the defendant's sanity. Moreover, since the record reflects that a single physician testified at the trial and that his testimony was to the effect that the crimes charged were the products of mental illness, whatever burden might be postulated as satisfying constitutional requirements was met here.

D. The claim that petitioner was entitled to the services of private psychiatrists at government expense was also not made below and for that reason should not be considered here. The record does not show that petitioner ever requested such relief at the trial. He received an impartial psychiatric examination by psychiatrists not beholden to the prosecution, but to the court. This Court and the lower federal courts have indicated in comparable circumstances that the defendant is not entitled to secure further psychiatric services or testimony at government expense. *Griffin v. Illinois*, 351 U.S. 12, cannot be read to require what petitioner demands, for otherwise he would be entitled to the services of any type

of expert whose services might be relevant. Neither the requirements of a fair trial, nor of equal protection, go so far.

E. Finally, petitioner claims that his involuntary confinement at St. Elizabeths Hospital is constitutionally justifiable only upon the assumption that he will receive treatment and rehabilitation, and without any proof asserts that conditions at St. Elizabeths are inadequate for this purpose. But the conditions at St. Elizabeths Hospital are not a proper subject for judicial notice and in any event inadequacies in treatment would be for Congress to rectify. The record contains uncontradicted evidence that petitioner has been receiving treatment.

ARGUMENT

INTRODUCTION

The determination made below, concurred in by six judges of the court of appeals, was upon a matter of peculiarly local concern, involving the procedure followed by the Municipal Court under the statutes and rules governing criminal insanity in the District of Columbia. With respect to local rules of law which the courts of the District of Columbia have fashioned, this Court's announced "policy is not to interfere * * *, save in exceptional situations where egregious error has been committed." *Fisher v. United States*, 328 U.S. 463, 476; *Griffin v. United States*, 336 U.S. 704, 717-18. In particular, this Court has for many years left to the United States Court of Appeals for the District of Columbia Circuit and to the Congress the formulation and overseeing of the rules controlling the defense of insanity in the District of Columbia.

In *Durham v. United States*, 214 F. 2d 862, 874-875 (C.A. D.C.), the court of appeals announced a new test of criminal responsibility to the effect that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." In the more than eighty opinions involving criminal insanity which the court has issued since the *Durham* case,^{*} the court has developed a body of law—never disturbed by this Court—which delicately balances the rights and needs of the individual and the claims of the community. In this area the court below therefore has both familiarity with the local problem and special responsibility for its solution.

90-93 Furthermore, by the passage of Section 24-301 of the D.C. Code (App., *infra*, pp. 45-46), Congress, acting in its special sphere of responsibility as the legislature of the District of Columbia (see *Griffin v. United States*, *supra*), made a judgment as to the disposition of persons who are relieved of criminal responsibility under the *Durham* rule. This legislative judgment necessarily involved the consideration of many interests, including the interest of the individual not to be held criminally responsible when he is not morally responsible and the interest of society in not punishing an individual upon whom it cannot assess blame.

The present proceeding jeopardizes the delicate balance struck by the court of appeals and by the Congress, and the judgments of these bodies therefore

^{*} See Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L. J. 905, 906 (1961).

should be reviewed by this Court with great restraint. Only if their choices are shown to be plainly invalid should the Court intervene.

I

THE TRIAL JUDGE PROPERLY REFUSED TO PERMIT PETITIONER TO PLEAD GUILTY

The record shows that petitioner originally entered pleas of not guilty to the informations (R. 19, 21, 25), and that he subsequently sought to change his pleas from not guilty to guilty (R. 19). Although we do not agree with all of petitioner's specific challenges to the original pleas of not guilty, we do not stand on those pleas, because they were apparently entered

Petitioner asserts that pleas of not guilty were entered "on behalf of petitioner, who was not then assisted by counsel" (Pet. Br. 5). The portions of the record cited by petitioner (R. 21, 25) simply show that the words "plea not guilty" were stamped upon the informations. The district court, in the *Adams corpus* action, specifically found that petitioner "initially entered a plea of not guilty and subsequently attempted to change his plea to one of guilty" (R. 19) (emphasis added). See also the statement of facts in the majority opinion of the court of appeals (R. 20). Rule 8 of the Municipal Court Criminal Rules provides that "[a]rraignment shall be conducted in open Court and shall consist of reading the information to the defendant or stating to him the substance of the charge and calling upon him to plead thereto." (Emphasis added.) The presumption of regularity (*Darr v. Burford*, 339 U.S. 200, 218; *Johnson v. Zerbst*, 304 U.S. 488, 488) must govern in the absence of any evidence that Rule 8 was not complied with.

Petitioner also asserts that the pleas of not guilty were "entered for him without his authority" (Pet. Br. 5). The record contains no support for this statement; nor does petitioner cite anything in the record to support this allegation.

when petitioner was without a lawyer and, although he waived counsel (R. 21, 25), there is serious doubt that he was competent at the time. We shall argue the case as if the attempted pleas of guilty were the first ones sought to be entered by petitioner. On that basis, we urge that the trial judge had discretion to refuse to accept the pleas, and that he did not abuse his discretion in petitioner's case.

A. THE TRIAL JUDGE HAS DISCRETION ON WHETHER TO ACCEPT A PLEA OF GUILTY

The court of appeals properly held that the Municipal Court, in its sound discretion, may refuse to permit a defendant to plead guilty (R. 33).

93

1. Rule 9 of the Municipal Court Criminal Rules (App., *infra*, p. 93) provides that "[t]he Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. * * *" On its face, the rule plainly vests the Municipal Court with discretion to reject a plea of guilty.

Petitioner contends that under Rule 9 the Municipal Court may refuse to accept a guilty plea only when in doubt as to whether "the plea is made voluntarily with understanding of the nature of the charge" (Pet. Br. 37). This construction does violence to the unambiguous language of the rule. Only the mandatory clause—"shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge"—contains any qualification; the permissive clause—"the Court may refuse to accept a plea of guilty,"—is wholly unqualified. Moreover, to say

that the permissive clause authorizes no more than what is compelled by the mandatory clause renders the permissive clause superfluous and attributes two contradictory purposes to the rulemaking authority. If the court is required to reject a plea of guilty when it is not voluntarily made, it cannot also be given discretion to do so.

2. Rule 9 is an exact replica of Rule 11 of the Federal Rules of Criminal Procedure. The history of Rule 11 confirms that the draftsmen intended to confer upon the district courts discretion to reject pleas of guilty, and that this discretion was not intended to be limited only to those instances involving a lack of voluntariness or understanding.

In the early drafts of Rule 11, the Advisory Committee on Rules of Criminal Procedure, appointed by this Court, provided simply that "[t]he court may refuse to accept a plea of guilty or of nolo contendere," without including any mandatory provision compelling the court, before accepting a guilty plea, to determine that the plea was voluntarily and intelligently made. See Orfield, *Pleas in Federal Criminal Procedure*, 35 Notre Dame Law 1, 2 (1959). In the First Preliminary Draft (seventh committee draft) dated May, 1943, the first sentence attained its final form, i.e., "[a] defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere." The draft provided in the second sentence that "[t]he Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the indictment or information charges an offense and that the plea is made volun-

tarily with understanding of the nature of the charge." In the Second Preliminary draft (eighth committee draft), dated February, 1944, Rule 11 attained its final form. No changes were made in the Report of the Advisory Committee (ninth committee draft), dated June, 1944. See Orfield, *supra*, at 5. This Court adopted the rule without change. *Ibid*. Thus, it is clear that, from the inception of their work, the draftsmen of Rule 11 intended to vest the district courts with unqualified power to reject a plea of guilty, and that the mandatory clause was added in the later drafts only for the purpose of imposing a duty upon the courts in certain specific cases.

Further confirmation of the intent of the draftsmen is found in the notes of the Advisory Committee on the Rule as contained in the First and Second Preliminary drafts. As the Advisory Committee stated (emphasis added):

* * * That a defendant may plead guilty, and that *the court may refuse or delay acceptance of the plea*, is in accordance with the common law as followed in the federal courts. See *Hallinger v. Davis*, 146 U.S. 314, 318 (1892); *United States v. Trinder*, 1 F. Supp. 659 (D. Mont. 1932). See also Blackstone, *Commentaries* (1769) * * * 329, 332; and 1 Chitty, *Criminal Law* (5th Am. ed. 1847) * * * 422, 434, 471.

The Committee, in stating that "the court may refuse * * * acceptance of the plea," used wholly unqualified language. That this wording was not inadvertent is confirmed by the citation to *United States v. Trinder*, 1 F. Supp. 659 (D. Mont.), for in the *Trinder* case

the district court refused to accept pleas of guilty on grounds other than a lack of voluntariness or understanding. The defendants, minor Indian wards, were indicted for stealing a government automobile. Two of the defendants pleaded guilty. It appeared, however, that they had taken the automobile for temporary use with intent to return it to the place of taking. Because an intent permanently to deprive the owner of his property was an element of the offense of larceny, the court concluded that the defendants were not guilty as charged, rejected the guilty pleas, and dismissed the case against them. The citation to the *Trinder* case is convincing evidence that the draftsmen of Rule 11 were aware that there may be circumstances, other than a lack of voluntariness or understanding, which justify a trial court in refusing to accept a plea of guilty.

3. The procedure adopted in the *Trinder* case, *supra*, is in accord with the procedure followed by other courts when it affirmatively appears that the defendant, notwithstanding his plea of guilty, was in fact not guilty of criminal conduct. In *United States v. Echols*, 253 Fed. 862 (S.D. Tex.), it appeared to the court upon inquiry of the defendant and of the government witnesses that the defendant had been entrapped by a government officer into committing the offense charged. The court thereupon refused to accept the defendant's plea of guilty and dismissed the case. See also *United States v. Bysososki*, 144 F. Supp. 806 (D.N.J.); *State v. Hardy*, 339 Mo. 897, 98 S.W. 2d 593; *R. v. Rivett*, 34 Cr. App. R. 87, 91.

In many state cases, the courts have held it to be the duty of a trial court to *reject* a plea of guilty

when there is plain evidence of innocence.* Thus, in *Harshman v. State*, 232 Ind. 618, 115 N.E. 2d 501, the defendant pleaded guilty but indicated at the same time that he did not know whether he had committed the crime charged. The trial court accepted the plea of guilty. On appeal from the denial of a writ of error *coram nobis*, the Supreme Court of Indiana held that the guilty plea should have been rejected. The court declared (232 Ind. at 621, 115 N.E. 2d at 502) that (emphasis added):

* * * No plea of guilty should be accepted when it appears to be doubtful whether it is being intelligently and understandingly made, or when it appears that, for any reason, the plea is wholly inconsistent with the realities of the situation.

English cases are to the same effect.* See also *Carter v. United States*, 350 U.S. 928.¹⁰

* *People v. Morrison*, 348 Mich. 88, 81 N.W. 2d 667; *People v. Scofield*, 142 Mich. 221, 105 N.W. 610; *State v. Stacy*, 43 Wash. 2d 358, 261 P. 2d 400; *State v. Reali*, 26 N.J. 222, 139 A. 2d 300; *Commonwealth v. Cavanaugh*, 183 Pa. Super. 417, 133 A. 2d 288.

* *The King v. Ingelson*, 1 K.B. [1915] 512, 513.

¹⁰ Petitioner cites no case in which the issue was whether the trial court properly could reject a guilty plea. In *Patton v. United States*, 281 U.S. 276, and *State v. Kaufman*, 51 Iowa 578, 2 N.W. 275, the sole question was whether, with the consent of the government and the court, the defendants could waive their constitutional right to trial by a jury of twelve persons. In *Keroheval v. United States*, 274 U.S. 220, 223, the narrow issue was whether a plea of guilty withdrawn by leave of court is admissible against the defendant on his trial arising on a substituted plea of not guilty. In *Pope v. State*, 56 Fla. 81, 47 So. 487, and *Canada v. State*, 144 Fla. 633, 198 So. 220, the issue was the right of the defendant to withdraw a

With respect to the precise issue before the trial judge in the present case, it has been held in several cases that it is proper for the judge to refuse to accept a plea of guilty where it appears from evidence that the accused was of unsound mind at the time of the commission of the offense.

For example, in Texas, a hearing is conducted in capital cases even after a plea of guilty is entered to enable the jury to assess the punishment. Where the evidence introduced at that hearing tends to show that the accused was insane at the time of the commission of the offense, the Texas courts have held that, where the defendant refuses to withdraw the plea of guilty, the trial court may itself withdraw the plea and enter a plea of not guilty in the defendant's behalf.¹¹ This rule has been applied in trials for non-

plea of guilty previously entered. In *Williams v. State*, 89 Okla. Cr. 95, 129, 205 P. 2d 524, 542, the question was whether the court properly accepted the plea of guilty. In *West v. Gammon*, 98 Fed. 426 (C.A. 6), the court held only that it was not a violation of the defendant's right of trial by jury for the court to pass sentence upon his plea of guilty. And in *Opinion of Justices*, 9 Allen 585 (Mass.), the court held only that, under Massachusetts law, the court was empowered to accept a plea of guilty to a charge of murder in the first degree. Dicta to the effect that a defendant has the "right" to plead guilty, uttered in cases involving the efforts of a defendant to avoid his improvident action in entering a guilty plea, are not persuasive. See *State v. Hardy*, 339 Mo. 897, 901, 98 S.W. 2d 593, 595, distinguishing *Pope v. State*, *supra*. Statements to the effect that a plea of guilty "is itself a conviction" presuppose acceptance and entry of the plea by the court.

¹¹ *Edwards v. State*, 134 Tex. Cr. 153, 114 S.W. 2d 572; *Thompson v. State*, 127 Tex. Cr. 494, 77 S.W. 2d 538; *Harris v. State*, 76 Tex. Cr. 126, 172 S.W. 975.

capital and nonviolent offenses as well as in capital cases where evidence of insanity at the time of the offense appears.¹³

At least one English case is in accord.¹⁴ In *R. v. Rivett*, 34 Cr. App. R. 87, counsel for the prosecution informed the trial judge that there was a question as to the prisoner's fitness to plead.¹⁵ A jury, sworn to try the issue, determined that he was fit to plead notwithstanding the evidence of two medical men to the contrary. The prisoner pleaded guilty, but the judge directed a plea of not guilty to be entered. The Court of Criminal Appeals declared that this action was "well warranted" (*id.* at 91).

4. On the basis of the language of Rule 9, the history of Rule 11, F.R. Crim. P. (the federal counterpart of Rule 9), and the case law, it is clear that a trial judge has discretion under Rule 9 to refuse to accept a plea of guilty. As the court of appeals declared in *Tomlinson v. United States*, 93 F. 2d 652, 654 (C.A. D.C.), certiorari denied, 303 U.S. 646: "An application by a defendant to change his plea [or, as we have shown, an attempt to enter a plea of guilty in the first place] is addressed to the sound discretion of the court, and the action of the court will not

¹³ *Yantis v. State*, 95 Tex. Cr. 541, 255 S.W. 180 (automobile theft).

¹⁴ We have not made a thorough search of the English cases.

¹⁵ The Court of Criminal Appeal described this procedure as "a perfectly correct course for the prosecution to take" (34 Cr. App. R. at 90).

be disturbed, unless there has been an abuse of that discretion."¹¹

B. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REFUSING TO PERMIT PETITIONER TO ENTER PLEAS OF GUILTY

The court of appeals properly held that the trial judge did not abuse his discretion in refusing to allow petitioner to enter pleas of guilty.

Petitioner tendered pleas of guilty to two offenses alleged to have been committed on October 20, 1959 and October 21, 1959 (R. 22, 26). When the guilty pleas were tendered, the trial judge had before him two reports submitted by the Assistant Chief Psychiatrist of the D.C. General Hospital, which were attached to one of the informations (R. 23, 24). The first report, dated December 4, 1959 (R. 23), declared that psychiatric examination had revealed petitioner "to be of unsound mind, unable to adequately understand the charges and incapable of assisting counsel in his own defense," and recommended that petitioner be committed to a psychiatric hospital for further care and treatment. The second report, dated December 28, 1959 (R. 24), after stating that petitioner had "shown some improvement and at this time appears able to understand the charges against him, and to assist counsel in his own defense," went on to say that, in the opinion of the author, petitioner "was suffering from a mental disease, i.e., a manic depressive psychosis, at the time of the crime charged," and

¹¹ Accord, *Mats v. People*, 133 Colo. 45, 291 P. 2d 1059; *People v. Banning*, 329 Mich. 1, 44 N.W. 2d 841; *Gardner v. State*, 140 Tex. Cr. 227, 144 S.W. 2d 284; see 4 Wharton, *Criminal Law and Procedure* § 1911.

that "[s]uch an illness would particularly affect his judgment in regard to financial matters, so that the crime charged would be a product of this mental disease." The second report stated further that petitioner appeared "to be in an early stage of recovery from manic depressive psychosis. It is thus possible that he may have further lapses of judgment in the near future. It would be advisable for him to have a period of farther treatment in a psychiatric hospital."

Not only was the trial judge aware of the fact that petitioner had been found, by the psychiatrist to whose supervision and observation petitioner had been committed, to be of unsound mind as of the time of the first report—dated approximately 45 days subsequent to the alleged offenses—but also the judge had a specific and unequivocal opinion from the same psychiatrist, in a report dated approximately nine weeks after the alleged offenses, that petitioner was of unsound mind at the time of those offenses, and that the offenses were the product of the mental illness.¹⁴ In these circumstances, the trial court properly concluded that criminal punishment should not be imposed without further inquiry into the question whether petitioner was criminally responsible for his acts.

¹⁴ Petitioner concedes (Pet. Br. 56) that the court of appeals has "appropriately ruled that public psychiatric authorities, conducting a mental examination to inquire into the competency of a defendant to stand trial, pursuant to D.C. Code Ann. § 24-301(a), must extend the scope of the examination, upon request of either the Government or defense, to include the defendant's mental state as of the time of the alleged crime. See *Winn v. United States*, 270 F. 2d 326 (D.C. Cir. 1959); *Calloway v. United States*, 270 F. 2d 334 (D.C. Cir. 1959)."

Acceptance of the guilty pleas would have resulted in the imposition of criminal punishment notwithstanding clear evidence that petitioner was not responsible for his conduct. A trial judge could properly conclude that to overlook such evidence would be to ignore the very basis of our criminal jurisprudence, for "[o]ur collective conscience does not allow punishment where it cannot impose blame" (*Holloway v. United States*, 148 F. 2d 665, 666-667 (C.A. D.C.)), certiorari denied, 334 U.S. 852.¹¹ To accept the pleas of guilty would have been to brand with a criminal record one who, as the court of appeals noted, had never before been convicted of a criminal offense and had served honorably as a commissioned officer in the armed forces (R. 36). Whatever may be the wish of the defendant or his counsel,

¹¹ The District of Columbia Circuit, in promulgating the *Durham* rule, stated (214 F. 2d 862, 876): "The legal and moral traditions of the western world require that those who, of their own free will and with evil intent (sometimes called *mens rea*), commit acts which violate the law, shall be criminally responsible for those acts. Our traditions also require that where such acts stem from and are the product of a mental disease or defect . . . moral blame shall not attach, and hence there will not be criminal responsibility." See also, *Douglas v. United States*, 239 F. 2d 52, 59, 60 (C.A. D.C.); *Williams v. United States*, 250 F. 2d 19, 25 (C.A. D.C.). This concept has ancient roots. In the *Trial of Edward Arnold*, 16 Howell, State Trials 695, 764, it was stated: "If he was under the visitation of God, and could not distinguish between good and evil and did not know what he did, though he committed the greatest offence, yet he could not be guilty of any offence against any law whatsoever, for guilt arises from the mind, and the wicked will and intention of the man. If a man be deprived of his reason, and consequently of his intention, he cannot be guilty . . ."

neither can force the court to affix criminal liability where the court knows there is none. For the fixing of criminal responsibility is not merely a matter of fairness to the accused. The integrity of criminal justice is put in doubt whenever a judgment of guilt is passed and sentence is imposed upon an innocent man even though it be done at his own wish. *Cf. Hopt v. Utah*, 110 U.S. 574, 579.

Beyond this, the trial judge could reasonably pay some attention to "society's great interest" in securing the community against repetition of petitioner's anti-social conduct¹² and in rehabilitating and restoring him to usefulness in the community." Under such circumstances, petitioner did not have an absolute right to waive trial, *Hopt* case, *ibid.*, and the judge did not abuse his discretion in refusing to permit him to enter pleas of guilty."

¹² See *Williams v. United States*, 250 F. 2d 19, 26 (C.A. D.C.); *Winn v. United States*, 270 F. 2d 326, 327 (C.A.D.C.), certiorari denied, 365 U.S. 848.

¹³ The existence of the possibilities of civil commitment did not relieve the trial judge of his obligation to protect the interests of the community and of the petitioner (see R. 34). In *Carter v. United States*, 283 F. 2d 200, 208 (C.A. D.C.), the court declared that the existence of other possibilities, including civil commitment, "does not relieve the bench and bar of the responsibility of endeavoring to reach at the earliest possible stage—ideally, prior to trial and sentence—the approach to a particular case which appears most just and appropriate, having regard to the individual's mental condition, his history, and the possibility of rehabilitating and restoring him to usefulness in the community."

¹⁴ Since an indication of insanity at the time of the offense is a "fair and just" reason (*Kercheval v. United States*, 274 U.S. 220, 224) for granting a defendant's motion for leave to withdraw a plea of guilty prior to imposition of sentence (*Gearhart v. United States*, 272 F. 2d 490 (C.A.D.C.)), it

G. THE TRIAL COURT'S REFUSAL TO ACCEPT THE PLEAS OF GUILTY DID NOT DEPRIVE PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner also argues that, by refusing to accept his pleas of guilty, the trial court deprived him of the effective assistance of counsel (Pet. Br. 40-44). Petitioner's argument is based on the theory that his counsel advised him to plead guilty. But the mere fact that the petitioner was advised by his lawyer to enter guilty pleas did not convert the court's otherwise proper ruling into a deprivation of effective assistance of counsel in the constitutional sense. A lawyer may advise his client to pursue many courses of action which may be unacceptable to the court, such as to plead nolo contendere, to introduce incompetent evidence, to secure release from prison pending trial on a homicide upon the client's own recognizance. Such advice is ineffective only in the sense that it is unsuccessful. But unless it can be said that half the litigants in the courts are ineffectively represented, unsuccessful representation cannot be equated with ineffective representation.²¹ A judge does not render counsel's assistance ineffective merely by rejecting the proposition he tenders. Similarly, "[a] claim of denial of due process can hardly be predicated upon the failure of a defense move." *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568. It is not the court's refusal to permit the con-

follows that evidence of insanity is a "fair and just" reason for refusing to permit a plea of guilty in the first place.

²¹ Circuit Judge (later Mr. Justice) Minton said: "We know that some good lawyer gets beat in every law suit." *United States ex rel. Weber v. Ragen*, 176 F. 2d 579, 586 (C.A. 7), certiorari dismissed, 338 U.S. 809.

summation of a lawyer's advice to forego an insanity defense, but the inadequacy of the advice itself, which gives rise to questions of ineffective assistance of counsel."

II

INSANITY IS NOT SIMPLY AN AFFIRMATIVE DEFENSE TO BE RAISED SOLELY BY THE DEFENDANT; THE ISSUE MAY ALSO BE RAISED BY THE PROSECUTION OR BY THE COURT ITSELF

In stating that "insanity is not strictly an affirmative defense and can be raised by either the court or the prosecution" (R. 34), the court below was merely adhering to the rule prevailing in the federal courts, which this Court formulated in *Davis v. United States*, 160 U.S. 409. In the *Davis* case, the Court took the view that, not only could the question of insanity be raised by the prosecution, but also that proof on the issue could be adduced by either side. The Court quoted from *Cunningham v. State*, 56 Miss. 269, to the effect that (160 U.S. at 491 (emphasis added)):

* * * whenever the condition of the prisoner's mind is put in issue by such facts proved on either side as create a reasonable doubt of his sanity, it devolves upon the State to remove it and to establish the sanity of the prisoner to

"In fact, the court of appeals has held that the efforts of defense counsel to remove the issue of insanity from the case constitutes error (*Tatum v. United States*, 190 F. 2d 612 (C.A. D.C.); *Clark v. United States*, 290 F. 2d 184 (C.A. D.C.)), and has indicated that the failure of defense counsel to raise the defense of insanity constitutes ineffective assistance of counsel and thus ground for a motion to vacate sentence under 28 U.S.C. 2255 (*Plummer v. United States*, 290 F. 2d 729, 730 (C.A. D.C.)).

the satisfaction of the jury beyond all reasonable doubt arising out of all the evidence in the case.

See also 160 U.S. at 493, and the Court's quotation (*id.* at 490) from *State v. Bartlett*, 43 N.H. 224, 231. The Court further stated (160 U.S. at 487-488 (emphasis added)):

Giving to the prosecution, where the defence is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, *by whatever side adduced*, guilt is established beyond reasonable doubt.

See *United States v. Strickland*, Crim. No. 374-59 (D.D.C.) (unreported), discussed in Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on *Constitutional Rights of the Mentally Ill*, 87th Cong., 1st Sess., 708-709 (1961).

The English authorities which petitioner cites (Pet. Br. 35-37; see also ACLU Br. 49) are hardly persuasive in light of the contrary view expressed by this Court. In any event, the English law is by no means clear. As authority for the statement that "the issue of insanity at the time of the offense may not be raised either by the Judge or by the prosecution, but only by the defense," petitioner cites Royal Commission on Capital Punishment, Report, § 443 (1953); Williams, *Criminal Law: The General Part*, § 93 (London 1953); and *Re v. Oliver*, 6 Cr. App. 19, 20 (1910). But the language employed by the court in *Re v. Oliver*, *supra* (cited in the Report of the Royal

Commission and in the book of Dr. Williams) was uttered in a case in which insanity had been raised as a defense by the defendant, and the case presented only the question of the proper procedure to be followed by the prosecution under those circumstances. As the report of the case concluded (6 Cr. App. at 21 (emphasis added)): "The court stated that the only general rule that could be laid down was that insanity, if relied upon as a defence, must be established by the defendant." Thus the case is authority only for the procedure to be followed where the issue of insanity has been raised by the defense. See Samuels, *Can the Prosecution allege that the Accused is Insane?* [1960] Crim. L. Rev. 453-54, 459-60. In this context the rule may be viewed simply as a regulation governing the manner of proof.

The English rule may well be different where insanity is not raised as a defense. In *Rex v. Bastian*, 42 Cr. App. 75, a prosecution for murder, the court ruled that "the defence having put in issue the state of the prisoner's mind by raising a defence of diminished responsibility, the court could not stop the prosecution from cross-examining witnesses called for the defence and calling evidence in rebuttal with a view to establishing insanity, and inviting the jury to return a verdict of Guilty but insane."²² See also

²² Commenting on the *Bastian* case, Professor J. C. Smith has stated that " * * the decision is a realistic one for a verdict of manslaughter on the ground of diminished responsibility will often be preferable, from the prisoner's point of view, to one of guilty but insane, when the result may be that the prisoner may be detained in Broadmoor for life. This latter result may well be in the public interest, and therefore, it is submitted, it is right that the Crown should be allowed to seek to achieve it." *Case and Comment* [1958] Crim. L. R. 382, 392.

Regina v. Kemp [1956] 3 W.L.R. 724, 729; cf. *Rex v. Nott*, 43 Cr. App. R. 8.

Moreover, the Report of the Royal Commission noted that in Scotland "[e]vidence of insanity at the time of the offence (or of diminished responsibility) is ordinarily led by the defence but it would be open to the Crown to raise the issue if the defence did not do so." Report, *supra*, § 444.²² In South Africa, too, the Crown is permitted to introduce evidence of insanity. Williams, *supra*, p. 311, n. 1. And in Canada, where the defendant pleads intoxication as a defense but denies insanity, the judge may, in spite of the denial, instruct the jury on the issue of insanity. *Rex v. Garrigan*, 4 D.L.R. [1937] 344.²³

Accordingly, under the circumstances of the present case, it would have been perfectly proper for the insanity issue to be raised by the prosecution, for the prosecution should not, in good conscience, prove the commission of an act forbidden by law, but withhold

²² The Commission declared that (*ibid.*) "[t]here is no case on record in which a prisoner who was believed to have been insane at the time of the act refused to let this special defence be put forward, but it is thought that, if this occurred, the Crown would call evidence of his mental condition, since it is the duty of the Crown to put all relevant evidence before the court."

²³ Dr. Glanville Williams, a noted British authority on criminal law, concludes that "[t]ruth should not be shut out merely because it is detrimental to the accused person, if it is neither irrelevant nor unduly misleading." Recognizing that "the lunatic can still be certified in the ordinary way," he nevertheless states that "it would seem preferable that the prosecution or the judge should be entitled to bring in the whole evidence on the criminal charge." Williams, *supra*, p. 313.

evidence of the defendant's lack of responsibility. As this Court stated in *Berger v. United States*, 295 U.S. 78, 88:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose * * * interest in a * * * criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

If the government may not conceal evidence tending to show that a defendant acted in self-defense, then surely it should have the right and the duty to introduce evidence tending to show his freedom from responsibility. The obligation of the government is not to indulge in a complicated legal game, but to bring the truth before the court.²² Thus, the court of appeals was correct when, citing the *Berger* case, it agreed with the government that "it does not matter whether the psychiatrist was called by the court or by the Government; in either case, he was properly called" (R. 30).

²² See also *Edmonds v. United States*, 260 F. 2d 474, 478 (C.A. D.C.), certiorari denied, 362 U.S. 977; Statement of Oliver Gasch, in Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, *supra*, 87th Cong., 1st Sess., pp. 584-587; Samuels, *supra*, p. 458.

III

PETITIONER'S COMMITMENT WAS AUTHORIZED BY STATUTE

A. THE PROVISIONS OF THE MANDATORY COMMITMENT STATUTE REQUIRE THE COMMITMENT OF ALL DEFENDANTS FOUND NOT GUILTY BY REASON OF INSANITY, WHETHER OR NOT THEY THEMSELVES RAISED THE INSANITY DEFENSE OR DESIRED TO PLEAD GUILTY

There is no warrant for petitioner's contention (Pet. Br. 53-54) that Section 24-301(d) of the D.C. Code (App., *infra*, p. 99), which requires the commitment of "any person tried upon an indictment or information for an offense," who "is acquitted solely on the ground that he was insane at the time of its commission", applies only to defendants who affirmatively raise the insanity defense. Nor is there any basis for the contention that the statute does not apply where the defendant wishes to plead guilty (ACLU Br. 50-53). The assumption underlying these arguments is that the sole, or the primary, congressional purpose in enacting the statute was to set the stage for an election by the defendant between imprisonment and hospitalization. The words of the statute neither expressly nor impliedly indicate any such purpose. Nor does the legislative history support the suggested construction.

Prior to *Durham v. United States*, 214 F. 2d 862 (C.A. D.C.), commitment of a defendant acquitted by reason of insanity in the District of Columbia courts was discretionary with the trial judge and the

Secretary of Health, Education, and Welfare," although it was customary for such persons to be committed as a matter of routine." The fear that the *Durham* rule would result in a flood of acquittals and that the acquitted defendants would be immediately turned loose stimulated agitation for new legislation. Krash, *supra*, p. 941.

In 1955, Congress enacted the present statute, making hospitalization mandatory in every case tried in the District of Columbia where a defendant is found not guilty by reason of insanity. "The primary legislative purpose was protection of the public safety." "The statute was designed "to guard against imminent recurrence of some criminal act" by a person acquitted on the ground of insanity who might not be deterred by punitive sanctions." The Committee on Mental Disorder As a Criminal Defense, whose recommendations formed the basis for the legislation, de-

" In 1954, the District of Columbia Code provided in pertinent part that "if an accused person shall be acquitted by the jury solely on the ground of insanity, the court may certify the fact to the [Secretary of the Department of Health, Education, and Welfare], who may order such person to be confined in the hospital for the insane * * *." D.C. Code § 24-301 (1951). See Committee On Mental Disorder As A Criminal Defense, *Report To The Council On Law Enforcement Of The District of Columbia*, in S. Rep. No. 1170, 84th Cong., 1st Sess., p. 18. Compare 24 U.S.C. 211.

" Krash, *supra*, 70 Yale L.J. at 941; S. Rep. No. 1170, *supra*, pp. 5, 12-13.

" Krash, *supra*, 70 Yale L.J. at 942.

" *Ibid.*

clared that "the public is entitled to know that, in *every case* [emphasis added] where a person has committed a crime as a result of a mental disease or defect, such person *shall* be given a period of hospitalization and treatment to guard against imminent recurrence of some criminal act by that person." S. Rep. No. 1170, 84th Cong., 1st Sess., p. 13. Both the House and the Senate committees stated that the bill amended existing law so as "[t]o provide that in *every case* where an accused is found not guilty of a crime solely by reason of insanity he shall be confined in a hospital for the mentally ill. *This is designed to protect the public* against the immediate unconditional release of accused persons who have been found not responsible for a crime solely by reason of insanity." H. Rep. No. 892, 84th Cong., 1st Sess., p. 3; S. Rep. No. 1170, *supra*, p. 3 (emphasis added). The mandatory commitment provision was also intended to protect the defendant and to provide a place and a procedure to rehabilitate and restore persons "as to whom the standards of our society and the rules of law do not permit punishment or accountability." *Ragsdale v. Overholser*, 281 F. 2d 943, 947 (C.A. D.C.).

In light of these purposes, the statutory scheme would be ill served by creating an exception in the case of a defendant who does not plead insanity, but who nevertheless is not responsible for his offense. Nor would it be consistent with the congressional purpose

to construe the statute as not applying where the defendant attempts to plead guilty.²¹

B. THE PROVISIONS OF THE MANDATORY COMMITMENT STATUTE APPLY TO ALL DEFENDANTS CHARGED WITH CRIME AND ACQUITTED ON THE GROUND OF INSANITY; NO EXCEPTION IS MADE FOR DEFENDANTS CHARGED WITH NONVIOLENT MISDEMEANORS

1. *Petitioner is barred from raising the issue here.*—Both petitioner (Pet. Br. 54) and the ACLU (ACLU Br. 54-56) argue here for the first time that the mandatory commitment statute should be construed as not applying to defendants charged with nonviolent misdemeanors. This claim was neither

²¹ In the *amicus curiae* brief of the American Civil Liberties Union (p. 51), it is suggested that "the Government can hardly take the position that the statute should be read literally, since the consequence would be that there could be no commitment without an affirmative finding of insanity, as opposed to a reasonable doubt as to mental disease or defect." Apparently, the ACLU suggests that, read literally, Section 24-301(d), which provides for mandatory commitment of a defendant "acquitted solely on the ground that he was insane" at the time of the offense, applies only where the jury has made an affirmative special finding of proven insanity at the time of the commission of the offense. But Congress, well aware of existing practice in the District of Columbia (see *Tatum v. United States*, 190 F. 2d 612 (C.A. D.C.); *Durham v. United States*, 214 F. 2d 862 (C.A. D.C.)), used the words "acquitted solely on the ground that he was insane" to mean "found not guilty by reason of insanity," which of course means not guilty because there was a reasonable doubt as to the accused's sanity. There is a substantial difference between reading a statute literally where the result would be absurd (as in the example suggested by the ACLU) and reading a statute literally where the result would be wholly consistent with the purpose of Congress.

made in the habeas corpus petition (see R. 3-6) nor presented to the court of appeals (see R. 41), nor urged as a ground for review in the petition for certiorari. For each of these reasons, the claim should not be considered by this Court. See *Lawn v. United States*, 355 U.S. 339, 362-3, n. 16; *Duignan v. United States*, 274 U.S. 195, 200; Rule 23(1)(c) of the Revised Rules of this Court.

2. *There is no merit to the claim.*—Even if the claim were properly before this Court, it would have no merit. Petitioner and the ACLU rely upon language of Judge Fahy, dissenting below, who concluded that, even if petitioner's trial and commitment were valid, his detention "would no longer be sustainable on the basis of that commitment" (R. 41); that "[s]ection 301(d)—the mandatory commitment provision—and section 301(e)—governing subsequent release—are part of a general plan and are to be read in relationship of one with the other" (R. 41); and that continued restraint of a person committed under subsection (d) was conditioned upon the existence of the "dangerousness" referred to in subsection (e) (R. 42).²² Judge Fahy further stated (R. 43):

* * * Congress in section 301(e) is not concerned with persons who have engaged in any

²² For this view of the statute, see also *Ragsdale v. Overholser*, 281 F. 2d 943, 949-50 (concurring opinion); *Overholser v. Russell*, 283 F. 2d 193, 198-99 (concurring opinion); *Overholser v. O'Beirne*, C.A.D.C., Oct. 19, 1961, slip op., pp. 22-23 (dissenting opinion).

kind of unlawful conduct, however minor, but only with persons who have engaged in unlawful conduct of a dangerous character. The language used conveys the idea of physical danger to persons and, perhaps, to property. I do not attempt to delineate precisely the boundaries fixed by the language used, but obviously they do not encompass any and every minor conflict with the law of which a person has been acquitted because of a doubt about his sanity. Had Congress intended such a broad coverage, it would have used broader language such as "likely to engage in unlawful conduct," rather than the narrow language of section 301(e), "dangerous to himself or others."

Judge Fahy concluded that the valid restraint of petitioner "depends upon a finding, never yet made, that he is of unsound mind [footnote omitted] and not upon meeting the conditions for release applicable to persons committed under section 301(d)" (R. 44).

91 We submit that this view is fallacious. In the present case the coverage of Section 24-301(e) (App., *infra*, pp. 92-93)—the release provision—is not in issue, because petitioner attacks only the validity of his initial commitment. He claims that his detention is illegal because the commitment was invalid, but makes no claim that, even if his commitment were valid, he nevertheless would be illegally detained at the present time. Under subsection (d), "any person" may be committed after he has been tried for "an offense" and

acquitted by reason of insanity. There is not the slightest indication in the subsection that the "offense" must be a "dangerous", much less a "violent", offense. The criteria for commitment are completely different from the criteria for release. Even subsection (e), the release provision, does not carry with it the implication that a person may be committed only for a "dangerous" offense. The subsection provides for a certification by the hospital when the "person will *not* in the reasonable future be dangerous to himself or others" (emphasis added), rather than when the person will *no longer* be dangerous. It does not follow from the fact that a person must not be dangerous in order to be released that he must be dangerous in order to be committed.

In any event, petitioner is "dangerous" within the meaning of subsection (e) if he is likely to repeat the conduct which resulted in his prosecution. In *Overholser v. Russell*, 283 F. 2d 195 (C.A. D.C.), the court of appeals concluded that a proclivity for writing bad checks was sufficient to make the appellant "dangerous" for purposes of determining his eligibility for release in a habeas corpus proceeding. The court stated that (283 F. 2d at 198):

We think the danger to the public need not be possible physical violence or a crime of violence. It is enough if there is competent evidence that he may commit any criminal act, for any such act will injure others and will expose the person to arrest, trial and conviction. There is always the additional possible

danger—not to be discounted even if remote—that a non-violent criminal act may expose the perpetrator to violent retaliatory acts by the victim of the crime.

Speaking of the comparable offense of theft, the court of appeals said in *Overholser v. O'Beirne*, decided Oct. 19, 1961, slip op., p. 19:

* * * [T]o describe the theft of watches and jewelry as "non-dangerous" is to confuse danger with violence [footnote omitted]. Larceny is usually less violent than [sic] murder or assault, but in terms of public policy the purpose of the statute is the same as to both. Larceny, assault and murder are all dangerous; they are simply different areas of prohibited conduct. Hence unless we are to ignore the objectives and policies of the statute in question, the release provisions must apply in the same way and with the same force to larceny without violence as to a crime of violence until Congress speaks otherwise. Of course the Superintendent of St. Elizabeths might well take into account, in making his appraisal of potential danger, the quality of the patient's abnormal mental condition as well as the history of conduct. But as we pointed out in *Overholser v. Russell*, 108 U.S. App. D.C. 400, 283 F. 2d 195 (1960), a "bad check" passer at large endangers himself by exposure to additional violations and additional arrests, trials and confinements, to say nothing of the serious effect on the public of his predatory tendencies.

IV

THE STATUTE UNDER WHICH PETITIONER WAS COMMITTED
IS CONSTITUTIONAL

A. EVEN THOUGH THE MANDATORY COMMITMENT PROVISION DOES NOT PROVIDE FOR A PRE-COMMITMENT HEARING OR FINDING ON THE ISSUE OF ACTUAL INSANITY AT THE TIME OF COMMITMENT, IT DOES NOT VIOLATE THE DUE PROCESS CLAUSE

1. *The requirements of due process are not the same for proceedings resulting in punishment and those for commitment for care and treatment.*—
“* * * [T]he requirements of due process frequently vary with the type of proceeding involved, e.g., compare *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 152, with *Interstate Commerce Comm’n. v. Louisville & N. R. Co.*, 227 U.S. 88, 91 * * *.” *Hannah v. Larche*, 363 U.S. 420, 440. There is a difference—significant for due process purposes—between proceedings to determine whether punishment should be inflicted and proceedings to determine whether care and treatment should be administered, even though the latter proceedings may also result in confinement. Cf. *Pee v. United States*, 274 F. 2d 556 (C.A. D.C.), and cases cited; Kadish, *A Case Study In The Signification Of Procedural Due Process—Institutionalizing The Mentally Ill*, 9 W. Pol. Q. 93, 101 (1956).

The individual who is committed to a mental institution after a verdict of not guilty by reason of insanity is not a “prisoner”; nor is he under “sentence.” *O’Beirne v. Overholser*, 287 F. 2d 133, 136 (C.A.D.C.). He is an “accused person confined to a hospital for the mentally ill.” D.C. Code § 24-301(b) (App., *infra*, p. 91); *O’Beirne v. Overholser*.

supra. Commitment in no sense partakes of punishment. "Nothing in the history of the statute—and nothing in its language—indicates that an individual committed to a mental hospital after acquittal of a crime by reason of insanity is other than a patient. The individual is confined in the hospital for the purpose of treatment, not punishment; and the length of confinement is governed solely by consideration of his condition and the public safety." *Hough v. United States*, 271 F. 2d 456, 463 (C.A.D.C.); accord, *Overholser v. O'Beirne*, *supra*, slip op., pp. 4, 15. Accordingly, the procedures which would be constitutionally indispensable in a criminal trial are not constitutionally required in mandatory commitment proceedings.

The significance of the distinction between punishment and treatment is reflected in the procedures employed in the area of civil commitment. The law of England and the Commonwealth countries has long been marked by the absence of mandatory requirements of notice and hearing in pre-commitment procedures.² A trend toward less formal procedures has

² See Kadish, *supra*, 9 W. Pol. Q. at 103-108. In England, an order of a justice based on a petition by a relative or friend and two medical certificates suffice to compel institutionalization, with no requirement of notice or hearing. Lunacy Act, 1890, 53-54 Vict., c. 5, Sec. 4 (1890) as amended, National Health Service Act, 1946, 9-10 Geo. 6, c. 81, Schedule 9 (1946); see Kadish, *supra*, 9 W. Pol. Q. at 103. The English law resulted from the recommendations of select committees which had examined the problem of committing the mentally ill. *Id.* at 107. Two full-scale investigations of the possible peril to personal liberties in the enforcement of the English commitment laws—by a Select Committee of the House of Commons in 1877, and by a Royal Commission in 1934—failed to convince the investigators of the existence of serious abuse or the need for major changes in the laws. Kadish, *supra*, 9 W. Pol. Q. at 108.

also been noted in this country." In the United States, a majority of the judicial decisions on the issue have held involuntary commitment of mental patients without notice or opportunity to be heard not violative of due process where the patient has the right, after commitment, to contest in a judicial proceeding the propriety of his confinement either by way of a statutory post-commitment hearing or by way of habeas corpus." Federal courts have refused to disturb such commitments."

²⁴ See Kadish, *supra*, 9 W. Pol. Q. at 109.

²⁵ See *Hammon v. Hill*, 228 Fed. 909 (W.D. Pa.); *Payne v. Arkebauer*, 190 Ark. 614, 80 S.W. 2d 76; *Hiatt v. Soucek*, 240 Iowa 300, 36 N.W. 2d 432; *In re Bryant*, 214 La. 573, 38 So. 2d 245; *McMahon v. Mead*, 30 S.D. 515, 139 N.W. 122; *In re Le Donne*, 173 Mass. 550, 54 N.E. 244; *In re Mast*, 217 Ind. 28, 25 N.E. 2d 1006; *In re Dowdell*, 169 Mass. 387, 47 N.E. 1033; *In re Crosswell*, 28 R.I. 187, 66 Atl. 55. *Contra*, *Barry v. Hall*, 28 F. 2d 222 (C.A. D.C.); *State ex rel. Fuller v. Mullinax*, 364 Mo. 858, 260 S.W. 2d 72; *In re Lambert*, 134 Cal. 626, 66 Pac. 851; *Appeal of Sleeper*, 147 Me. 302, 87 A. 2d 115; *People ex rel. Sullivan v. Wendel*, 33 Misc. 496, 68 N.Y.S. 948. *Th In re Wellman*, 3 Kan. App. 100, 45 Pac. 726, the court invalidated commitment proceedings in which the alleged insane person was confined in prison without explanation during the proceeding and no post-commitment safeguards apparently existed. In *State v. Billings*, 55 Minn. 467, 57 N.W. 206, the court struck down a commitment procedure which did not provide for notice or hearing, but no post-commitment safeguards were in evidence or discussed. Although there is dictum in *Simon v. Craft*, 182 U.S. 427, 436, 437, indicating that due process may require notice and "opportunity to defend" in lunacy proceedings, the Court's holding was only that it was necessary to conclude on the basis of the record that notice and opportunity to defend were

Footnote 30 on page 52.

The distinction between proceedings to determine whether punishment should be inflicted and proceedings to determine whether civil confinement for care and treatment should be imposed applies *a fortiori* where the need for prompt confinement pending observation is far more compelling than in the civil commitment case, i.e., where, as here, the individual involved has been found to have committed antisocial acts, and may very well continue his harmful conduct unless treated.

2. *A pre-commitment hearing after a verdict of acquittal by reason of insanity is not an essential element of due process.*—It should be made clear, at the outset, that implicit in a determination of not guilty by reason of insanity is the finding that the defendant actually committed the acts with which he was charged. The Court of Appeals for the District of Columbia Circuit made this plain in *Ragsdale v. Overholser*, 281 F. 2d 943 (discussed *infra*, at pp. 56-58)

actually granted. The Court did not discuss the issue of whether the availability of a judicial proceeding to test the legality of confinement validates a pre-commitment proceeding without notice or hearing. See generally Freund, *The Police Power, Public Policy and Constitutional Rights*, § 255 (1904); Kadish, *supra*, 9 W. Pol. Q. at 110-112; Lindman and McIntyre, *The Mentally Disabled And The Law*, 25, 26 (1961); Ross, *Commitment Of The Mentally Ill: Problems of Law and Policy*, 57 Mich. L. Rev. 945, 976-978 (1959).

²² See *Hammou v. Hill*, *supra*; *Hall v. Verdel*, 40 F. Supp. 941, 946 (W.D. Va.); *Shapley v. Cohoon*, 258 Fed. 752, 755 (D. Mass.).

and it is on this basis that the mandatory commitment procedure operates.

As early as *Hadfield's* case, decided in 1800, it was recognized that judges had power to order one acquitted by reason of insanity to be detained in custody as a dangerous person. *Trial of James Hadfield*, 27 Howell State Trials 1281, 1354-1356. See also *United States v. Lawrence*, No. 15,577, 26 Fed. Cas. 887, 891 (C.C. D.C.); Williams, *Criminal Law: The General Part*, § 89 (1953). Ever since then, the courts, acting pursuant to their inherent powers or under specific statutes, have ordered the confinement in mental hospitals of individuals found to be not criminally responsible because of their mental condition at the time of the perpetration of the criminal act. See *Overholser v. O'Beirne*, *supra*, slip op., p. 3. At present, criminal defendants who are acquitted on grounds of insanity are nearly always committed to mental institutions."

Courts have generally—and in modern times uniformly—held that a defendant acquitted by reason of insanity is not denied due process by commitment to a mental hospital without further hearing on the issue of his sanity at the time of the commitment, provided there are means available for thereafter securing his release upon a showing that he has recov-

" See Comment, *Releasing Criminal Defendants Acquitted and Committed Because Of Insanity: The Need For Balanced Administration*, 68 Yale L. J. 293 (1958). Commitment is now covered by statute in almost all jurisdictions. *Id.* at 306-307. A detailed analysis of the state statutes appears in Lindman and McIntyre, *The Mentally Disabled And The Law*, 373-382 (1961).

ered his sanity." These holdings are consistent with the view expressed by this Court that the object of a writ of habeas corpus "is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment." *Ekiu v. United States*, 142 U.S. 651, 652. This Court has also frequently indicated that due process normally requires no more than one opportunity to be heard, and if a full hearing is available at some stage of the proceeding, preliminary action need not meet any formal re-

²² *Overholser v. O'Beirne*, *supra*, slip op., pp. 16, 17; *Foller v. Overholser*, 292 F. 2d 732, 733 (C.A.D.C.); *Curry v. Overholser*, 287 F. 2d 137, 139 (C.A.D.C.); *Ragdale v. Overholser*, 281 F. 2d 943 (C.A.D.C.); *Orencia v. Overholser*, 163 F. 2d 763 (C.A.D.C.); *People ex rel. Peabody v. Chanler*, 133 App. Div. 159, 117 N.Y.S. 322, affirmed, 196 N.Y. 525, 89 N.E. 1109; *People ex rel. Peabody v. Baker*, 59 Misc. 359, 110 N.Y. Supp. 848; *Ex parte Slayback*, 209 Cal. 480, 288 Pac. 769; *Ex parte Brown*, 39 Wash. 160, 81 Pac. 552; *State v. Saffron*, 146 Wash. 202, 262 Pac. 970; *Ex parte Clark*, 86 Kan. 539, 121 Pac. 492; *People v. Dubina*, 304 Mich. 363, 8 N.W. 2d 99, certiorari denied, 319 U.S. 766. *Contra*, *Brown v. Urquhart*, 139 Fed. 846 (C.C.W.D. Wash.), reversed on other grounds, 205 U.S. 179. Prior to *People v. Dubina*, the Michigan Supreme Court had held invalid a commitment statute which precluded the confined person from subsequently securing any investigation and judicial determination of his sanity. *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633. In *In re Boyett*, 136 N.C. 415, 48 S.E. 789, a North Carolina statute provided that a person acquitted of a capital crime on the ground of insanity and committed was not to be released except by a special act of the legislature. The statute was struck down because it expressly denied the person the right of habeas corpus and of a judicial determination of the validity of the detention. See Weihofen, *Mental Disorder as a Criminal Defense* 378 (1954).

quirements." This same principle has been held applicable in proper cases to deprivations of liberty required in the public interest."

The fact that in the District of Columbia a verdict of not guilty by reason of insanity must be returned where the trier of fact has no more than a reasonable doubt of the defendant's sanity does not render the defendant's commitment constitutionally invalid. The District of Columbia is not the only jurisdiction having a mandatory commitment statute in which the verdict of acquittal by reason of insanity has the same meaning." Some state courts have upheld the commitment of defendants found not guilty by reason of insanity even where, between the date of the offense and the date of the acquittal, a specific determination of sanity had intervened." The allowable area of choice permits such rulings by the law-makers in weighing the various considerations bearing on the problem.

Peculiarly pertinent is the observation made by the *amicus* (ACLU Br. 6-7) that Congress was faced with

" See, e.g., *Bailey v. Anderson*, 326 U.S. 203; *American Surety Co. v. Baldwin*, 287 U.S. 156; *Bragg v. Weaver*, 251 U.S. 57.

" *Yakus v. United States*, 321 U.S. 414, 443; *Hirabayashi v. United States*, 320 U.S. 81; cf. *Jacobson v. Massachusetts*, 197 U.S. 11.

" In Nebraska, for example (*Thompson v. State*, 159 Neb. 685, 68 N.W. 2d 267), the prosecution must prove sanity beyond a reasonable doubt, once the issue is properly raised.

" See *Hodison v. Rogers*, 137 Kan. 950, 22 P. 2d 491; *In re Ostatter*, 103 Kan. 487, 175 Pac. 377; *State v. Burris*, 169 La. 520, 125 So. 580; Annot., 88 A.L.R. 1084.

the task of reconciling conflicting interests: "If [the commitment] standards are unreasonably stringent, persons who would be entitled to an acquittal by reason of insanity may be reluctant to raise the defense. On the other hand, if the standards are unreasonably lax, juries may be overly chary of acquitting defendants on the grounds of insanity because of a belief that this would seriously jeopardize the security of the citizens of the District of Columbia." Congress has made its choice in a delicate area among standards which are not susceptible of objective or precise evaluation. That choice surely is not so irrational as to offend due process, especially when it is remembered that the commitment which occurs when there is a reasonable doubt of sanity is only the corollary of the rule that the defendant is acquitted where there is but a reasonable doubt of sanity. The commitment test is the exact equivalent of the acquittal test and was adopted in order to close any gap between an insanity acquittal and the furnishing of necessary care and treatment.

In the District of Columbia, the question has been thoroughly explored by the court of appeals and resolved adversely to petitioner. In *Ragsdale v. Overholser*, 281 F. 2d 943 (C.A. D.C.), the court explicitly upheld the present mandatory commitment statute against the contention made here. The court pointed out (*id.* at 948, 949) that implicit in a verdict of not guilty by reason of insanity is the conclusion that the defendant committed the acts

charged " and that there is a rational basis for the belief that he suffered from a mental disorder of which the offense was a product; " (2) that Congress might well have concluded that a hearing immediately following the verdict to determine the defendant's then mental condition would be meaningless because psychiatrists would not have had a reasonable opportunity to subject him to observation and examination and to report their findings; " (3) that

" See also *Rucker v. United States*, 280 F. 2d 623, 625, 288 F. 2d 146 (C.A. D.C.). In 1883 Queen Victoria, shot at by a man who was found "not guilty on the ground of insanity," asserted that the man must have been guilty because she had seen him fire the pistol herself. Since that time the verdict in England has been "[g]uilty of the act or omission charged against him, but insane at the time." Trial of Lunatics Act, 1883. This verdict is generally contracted into "guilty but insane." Williams, *Criminal Law, The General Part* § 90; Royal Commission on Capital Punishment, *Report*, 156, 157 (1953).

" See *Tot v. United States*, 319 U.S. 463.

" The fact that between the date of the offense and the date of the commitment there has been a finding of competency to stand trial is, as the ACLU concedes (ACLU Br. 25), "not necessarily incompatible with the existence of mental illness, since under section 301(a) a person is competent to be tried as long as he is able to 'understand the proceedings against him * * * [and] properly to assist in his own defense.' See, e.g., *Durham v. United States*, 237 F. 2d 760, 761 (D.C. Cir. 1956); *Williams v. Overholser*, 162 F Supp. 514 (D. D.C. 1958)." See also *Overholser v. Leach*, 257 F. 2d 667, 670, n. 4 (C.A. D.C.), certiorari denied, 359 U.S. 1013. There is reason to believe that in this very case the psychiatrist who testified at petitioner's trial declared that, although petitioner was competent to stand trial, he was nevertheless suffering from a mental illness at the time of trial. (R. 13; statement by counsel for petitioner on information and belief.) A finding of competency to stand trial, moreover, is not incompatible with dangerousness. *Overholser v. Leach*, *supra*.

it is not unreasonable to refuse to permit the defendant to remain at large while psychiatrists are attempting to determine whether he is dangerous, since a premature release could lead to the commission of new criminal acts, and (4) that the defendant may judicially test the legality of his confinement by a habeas corpus proceeding in which he is free to demonstrate by evidence that he has recovered to the point where he will not be dangerous to himself or to others." "In these circumstances," the court stressed, "the public interests sought to be protected outweigh * * * [petitioner's] claimed right to be set free the instant a verdict is returned" (281 F. 2d at 949). Judge Fahy, concurring (281 F. 2d at 950), agreed "that there is a rational relationship between mandatory commitment under section 24-301 and an acquittal by reason of insanity," and declared that "it is not undue process of law for society, in seeking a solution of the problem with which the legislation copes, to use such a provision as section 24-301, notwithstanding there is no finding of insanity, but only a doubt with respect to sanity, when section 24-301 comes into operation. See *Greenwood v. United States*, 350 U.S. 366." Differing divisions of the court of appeals have reaffirmed the holding on constitutionality in *Ragsdale. Curry v. Overholser*, 287 F. 2d 137 (C.A.D.C.); *Foller v. Overholser*, 292 F. 2d

* See *Greenwood v. United States*, 350 U.S. 366, 375; *Overholser v. O'Beirne*, *supra*, slip op., pp. 5, 16, 17. See also *Tatum v. United States*, 275 F. 2d 894 (C.A. D.C.); *Lewis v. Overholser*, 274 F. 2d 592 (C.A. D.C.); *Overholser v. Leach*, 287 F. 2d 667 (C.A. D.C.), certiorari denied, 359 U.S. 1013; *Stewart v. Overholser*, 186 F. 2d 339 (C.A.D.C.).

732, 734 (C.A.D.C.); *Overholser v. O'Beirne*, decided October 19, 1961 (C.A. D.C.)."

Petitioner's argument suffers from the fatal assumption that Congress, in formulating procedures to be followed after a verdict of not guilty by reason of insanity in a criminal trial, is required to duplicate civil commitment proceedings. But Congress may reasonably distinguish, for the reasons stated by the court of appeals in the *Ragsdale* case, between procedures for the civil commitment of individuals "engaged in the ordinary pursuits of life" and the treatment of that "exceptional class of people" who have committed acts forbidden by law and have been found not guilty by reason of insanity. *Overholser v. Leach*, 257 F. 2d 667, 669 (C.A. D.C.), certiorari denied, 359 U.S. 1013; *Overholser v. O'Beirne*, *supra*, slip op. p. 6. "[A] man who is in

"The district court below agreed that Section 24-301 was constitutional: "I think the procedures set up in 301 are constitutional and I think they have been sustained by the Court of Appeals in a number of cases" (R. 15).

"Because this distinction is "rooted in reason," the argument that Section 24-301 deprives petitioner of the equal protection of the laws (ACLU Br. 28, 29) is without merit. Cf. *Minnesota, ex rel. Pearson v. Probate Court of Ramsey County*, 300 U.S. 270, where this Court, in sustaining the Minnesota Sexual Psychopath statute, held (300 U.S. at 274-275): "Equally unavailing is the contention that the statute denies appellant the equal protection of the laws. The argument proceeds on the view that the statute has selected a group which is a part of a larger class. The question, however, is whether the legislature could constitutionally make a class out of the group it did select. That is, whether there is any rational basis for such a selection. We see no reason for doubt upon this point. Whether the legislature could have gone farther is not the question. The class it did select is identified by the state

a hospital because he has committed a crime, for which he has been exculpated, is a different individual from the individual who has been sent there as a mental case."⁶

This distinction is implicitly recognized in statutes of other jurisdictions which either, like Section 24-301, require automatic commitment after an acquittal by reason of insanity,⁷ or grant to the court discretionary commitment authority in such cases without requiring post-trial inquiry,⁸ or require

court in terms which clearly show that the persons within that class constitute a dangerous element in the community which the legislature in its discretion could put under appropriate control. As we have often said, the legislature is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law 'presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.'"⁹ Accord, *People v. Chapman*, 301 Mich. 584, 595-597, 4 N.W. 2d 18, 23-24.

⁶ Statement of Dr. Manfred S. Guttmacher, concurred in by Dr. Overholser (S. Rep. 1170, 84th Cong., 1st Sess., p. 14), in support of the District of Columbia mandatory commitment law.

⁷ England, eleven states and the Virgin Islands have mandatory commitment laws. Criminal Lunatics Act, 40 Geo. 2, c. 94 (1800; Trial of Lunatics Act, 46 & 47 Vict., c. 28, s. 2 (1882); Colo. Rev. Stat. Ann. § 29-2-4 (Supp. 1957); Ga. Code Ann. § 27-1508 (1953); Hawaii Rev. Laws, 1955, § 288-28; Kan. Gen. Stat. Ann. § 62-1532 (1949); Mich. Stat. Ann. § 26.133(2) (1954); Minn. Stat. Ann. § 631.19 (Supp. 1960); Neb. Rev. Stat. 1943, § 29-2203 (Revised of 1936); Nev. Rev. Stat. Ann. § 175.445 (1955); Ohio Rev. Code Ann. § 2945.29 (1953); N.Y. Sen. Laws, 1960, Ch. 550, §§ 1-3; Wis. Stat. Ann. § 967.11 (1959); V.I. Code Ann. § 5-3627 (1957).

⁸ Ark. Stat. Ann. § 50-242 (Supp. 1956); Conn. Gen. Stat. § 54-37 (Supp. 1956); Del. Code Ann., Title 11, § 4708 (1960 Supp.); La. Rev. Stat. Ann. § 28.39 (1951); Me. Rev. Stat. Ann., Ch. 27, § 119 (1954); N.M. Stat., 1953, Ann. § 41-13-3 (1954);

commitment upon notice that the grand jury has refused to indict because of insanity at the time of the offense."²

It is the failure to distinguish between ordinary civil commitment and commitment under Section 24-301 which accounts for petitioner's erroneous assumption that, to support the constitutionality of Section 24-301, it is necessary to argue that a presumption can be made, from the verdict of not guilty by reason of insanity, that the defendant, at the time of the commitment, actually suffers from a mental disorder (Pet. Br. 49). In urging that it is not rational to presume, from a finding implying only a reasonable doubt of sanity at the time of the commission of the offense, that the defendant is in fact mentally ill at the time of the commitment, petitioner is refuting an argument which we do not make. The only presumption which it is necessary to defend is that a finding of not guilty by reason of insanity—i.e., that the defendant committed an act proscribed by law, but that there is a rational doubt whether the act was the product of a mental disease or defect—supports the inference that the defendant *may* still be mentally ill and therefore *may* repeat his anti-social conduct if not treated. We doubt that petitioner would argue that this inference "is so strained as not to have a reasonable relation to the circumstances of life as we

Pa. Stat. Ann., Title 19, § 1251 (1980); S.C. Code Ann. § 32-927 (1980 Cum. Supp.).

² See Lindman and McIntyre, *The Mentally Disabled And The Law*, 348 (1961).

know them." *Tot v. United States*, *supra*, 319 U.S. at 468. And since Congress could rationally make this assumption, it could provide for commitment for further observation and treatment to the extent necessary."

B. THE CONSTITUTIONALITY OF THE RELEASE PROVISIONS IS NOT IN ISSUE IN THE PRESENT CASE

Petitioner suggests that habeas corpus is an inadequate remedy because the court of appeals has interpreted Section 24-301 to place what is in petitioner's view too great a burden upon the individual seeking release (Pet. Br. 52). But what constitutes an appropriate standard for determining, in a habeas corpus proceeding, whether the petitioner is entitled to be released is not a question properly before this Court at this time. Petitioner has never made the claim during this proceeding that he is now of sound mind, and the uncontradicted evidence in the record shows that he is not (R. 8). As the dissenting opinion below

"The constitutionality of petitioner's commitment is not affected by the fact that the offenses with which he was charged were misdemeanors. Felonies do not exhaust the list of dangerous activities which society has a stake in controlling. Nor does the fact that petitioner's offenses did not involve violence invalidate his commitment. To say that society is not threatened by the kind of conduct for which petitioner was prosecuted "is to confuse danger with violence." *Overholser v. O'Brien*, *supra*, *alip op.*, p. 12. In England, the result of a verdict of "guilty but insane" is a court order requiring the accused to be detained in Broadmoor Institution "until Her Majesty's pleasure be known." While at first applicable only to cases involving felonies, Criminal Lunatics Act, 1900, the provision was extended to misdemeanors in 1903. Trial of Lunatics Act, s. 2; see Williams, *Criminal Law, The General Part*, § 89.

notes, petitioner attacks his detention solely upon the ground that his commitment was invalid (R. 41). The issue, therefore, is the validity of his initial commitment—not the standards governing his eligibility for release.

To be sure, the commitment in the present case is validated, in part, on the ground that habeas corpus is subsequently available. But if the general availability of habeas corpus with constitutionally sufficient standards governing burden of proof were sufficient to validate the commitment, it would be inappropriate, in advance of a specific habeas corpus proceeding testing the particular petitioner's eligibility for release, to invalidate a commitment on the ground that in *other* cases the standards applied in release proceedings have not met constitutional requirements. Cf. *Liverpool, N.Y. & P.S.S. Co. v. Commissioners*, 113 U.S. 33, 39; *United States v. Raines*, 362 U.S. 17. If, for example, in a habeas corpus proceeding, a petitioner, claiming eligibility for release, were unable to adduce any proof whatsoever in support of his claim, a court would properly deny the petition for habeas corpus without reaching the constitutional issue because the petitioner would not be able to satisfy any appropriate standard relating to the burden of proof of his sanity.

That it is unnecessary to decide the abstract constitutional question posed here appears from the very arguments advanced in support of the contention that the release procedures formulated by the court of appeals are unconstitutional. Thus, the ACLU argues (ACLU Br. 36-38) that a sociopath, even if

classified as "sane," "might, under the decisions of the court of appeals, be held in a mental institution as suffering from an "abnormal mental condition" (*Overholser v. Leach*, 257 F. 2d 667 (C.A. D.C.), certiorari denied, 359 U.S. 1013), and that this may result in indefinite confinement because it is difficult to treat sociopaths." But according to the respondent's return to the petition for a writ of habeas corpus, which is uncontroverted by any other evidence in the record, *petitioner* is suffering, not from a sociopathic personality, but from a "Manic Depressive Reaction, Manic Type" (R. 8). Certainly, it would violate all accepted principles of judicial restraint in dealing with constitutional questions in a case not involving a sociopath to hold a commitment unconstitutional because it may be thought to be illegal to subject a sociopath to continuing confinement for failure to satisfy the requirements of the release statute."

"St. Elizabeths Hospital presently classifies the sociopathic personality as a "mental disease" (see *Overholser v. O'Beirne*, *supra*, slip op., p. 8; *In re Rosenfeld*, 157 F. Supp. 18 (D. D.C.), reversed, 202 F. 2d 34 (C.A. D.C.)), although there is still considerable dispute about this terminology among psychiatrists (see *Blocker v. United States*, 288 F. 2d 853, 859-860 (C.A. D.C.)).

"See Weithofen, *Mental Disorder As a Criminal Defense* 27 (1954); Comment, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity; The Need For Balanced Administration*, 68 Yale L.J. 293, 303 n. 44 (1958).

"* * * [O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States v. Raines*, *supra*, 362 U.S. at 21.

**C. THE STANDARDS FOR DETERMINING ELIGIBILITY FOR RELEASE ARE
CONSISTENT WITH DUE PROCESS**

If the constitutionality of the standards for determining eligibility for release is properly before the Court in this case, we submit that those standards are wholly consistent with due process.

1. *To qualify for release, a petitioner is properly required to establish that he is no longer suffering from an abnormal mental condition.*—Under Section 24-301(e) (App., *infra*, pp. 91-93), when a person has been confined in a hospital for the mentally ill pursuant to subsection (d), and the hospital superintendent certifies that such person (1) has recovered his insanity, (2) will not (in the opinion of the superintendent) be dangerous to himself or others in the reasonable future and (3) is entitled (in the opinion of the superintendent) to his unconditional release from the hospital, the certificate is sufficient to authorize the court to order the unconditional release of the person so confined. The court in its discretion may, or upon objection of the United States or the District of Columbia must, after due notice, hold a hearing at which evidence as to the mental condition of the person confined may be submitted, including the testimony of one or more psychiatrists from the hospital. If the court, after weighing the evidence, finds that the person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, it must order him unconditionally released. If the court does

not so find, it must order the person returned to the hospital."

Subsection (e) does not provide for a judicial proceeding in the absence of a certificate from the superintendent of the hospital. Subsection (g) (App., *infra*, p. 93), however, provides that: "Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus."

The standards for determining eligibility for release in a habeas corpus proceeding have been delineated in a series of decisions by the court of appeals. These standards were recently reviewed by that court in *Overholser v. O'Beirne*, *supra*, slip op., pp. 5-6:

Under standards established in a series of cases beginning with *Overholser v. Leach* [*Ragsdale v. Overholser*, 281 F. 2d 943 (C.A. D.C.); *Overholser v. Russell*, 283 F. 2d 195 (C.A. D.C.); *Starr v. United States*, 264 F. 2d 377, certiorari denied, 359 U.S. 936; *Overholser v. Leach*, 257 F. 2d 667 (C.A.D.C.), certiorari denied, 359 U.S. 1013], we have construed § 301(g) as requiring the petitioner who seeks release without the statutory medical certification of recovery to show (1) that he has recovered his sanity and (2) that such recovery has reached the point where he has no abnormal mental condition which in the reasonably for-

¹⁷ The statute contains comparable provisions governing cases in which the superintendent does not certify that the person confined is in such a condition as to warrant his unconditional release, but does certify that his condition warrants conditional release under supervision.

seeable future would give rise to danger to the petitioner or to the public in the event of his release. The mere fact that a person so confined has some dangerous propensities does not, standing alone, warrant his continued confinement in a government mental institution under § 24:301 D.C. Code. The dangerous propensities, as we have noted, must be related to or arise out of an abnormal mental condition. See *Starr v. United States*, 105 U.S. App. D.C. 91, 264 F. 2d 377 (1958). That abnormal mental condition may be the precise mental condition which constituted the basis for his acquittal or it may be a residual condition remaining in a person who has improved.

The rationale for this interpretation of subsection (g) was stated by Judge Washington, speaking for a unanimous court in *Overholser v. Leach*, *supra*, 257 F. 2d at 669-670:

The test of this statute is not whether a particular individual, engaged in the ordinary pursuits of life, is committable to a mental institution under the law governing civil commitments. Cf. *Overholser v. Williams*, 1958, 102 U.S. App. D.C. 248, 252 F. 2d 629. Those laws do not apply here. This statute applies to an exceptional class of people—people who have committed acts forbidden by law, who have obtained verdicts of “not guilty by reason of insanity,” and who have been committed to a mental institution pursuant to the Code [footnote omitted]. People in that category are treated by Congress in a different fashion from persons who have somewhat similar mental conditions, but who have not committed offenses or obtained verdicts of not guilty by reason of

insanity at criminal trials. The phrase "establishing his eligibility for release," as applied to the special class of which Leach is a member, means something different from having one or more psychiatrists say simply that the individual is "sane." There must be freedom from such abnormal mental condition as would make the individual dangerous to himself or the community in the reasonably foreseeable future.

The standard adopted by the court of appeals is an appropriate interpretation of the statute."¹⁰ It allows for the fact that recovery from a behavior disorder, unlike recovery from most physical illness, "does not come overnight," but is "slow and dubious at best and * * * rarely as predictable as the course of a physical disease." *Overholser v. O'Beirne, supra*, slip op., p. 14. The concept of "abnormal mental condition" encompasses the idea, that a patient may progress from what is indisputably a "mental disease" to a condition which cannot with confidence be so labeled but which nevertheless potentially exposes himself or others to danger. See *ibid.*; *Ragsdale v. Overholser*, 281 F. 2d 943, 947 (C.A. D.C.). The test of legal responsibility for crime is not necessarily the test appropriate for determining whether commitment—the purpose of which is the protection of the individual

¹⁰The "abnormal mental condition" standard has been concurred in by all nine judges of the Court of Appeals. The opinion in the *Leach* case was written by Judge Washington and joined in by then Chief Judge Edgerton and Judge Burger. It was adhered to by Judges Miller, Prettyman, Danaher and Bastian in the *Starr* case (264 F. 2d at 383) and by Judges Bagelon and Fahy in *Hough v. United States*, 271 F. 2d 458, 461, 462 (C.A.D.C.).

and of society—should continue.” The District of Columbia general standard—freedom from an abnormal mental condition making the individual dangerous—rationally balances both personal and communal interests.

2. *The burden of proof in a release proceeding is consistent with due process.*—Subsection (g) of Section 24-301 (App., *infra*, p. 92) indicates that the burden of proof in a release proceeding is on the petitioner. In *Overholser v. Leach*, 257 F. 2d 667, 669 (C.A. D.C.), certiorari denied, 359 U.S. 1013, the court of appeals ruled that the petitioner must show that the refusal of the superintendent of the hospital to certify that the petitioner had recovered his sanity and would not in the reasonable future be dangerous to himself or others was arbitrary and capricious. And in *Ragsdale v. Overholser*, 281 F. 2d 943, 947 (C.A. D.C.), the court declared that “[i]n a ‘close’ case even where the preponderance of evidence favors the petitioner, the doubt, if reasonable doubt exists about danger to the public or the patient, cannot be resolved so as to risk danger to the public or the individual.”

There can be no constitutional barrier to placing such a burden on the patient to establish his eligibility for release. Release after acquittal by reason of insanity generally demands a stronger showing of

²² It has been noted that such a test may lead to premature release. See the comments on *Yankulov v. Bushong*, 80 Ohio App. 497, 77 N.E. 2d 88 in Comment, *Releasing Criminal Defendants Acquitted And Committed Because of Insanity: The Need for Balanced Administration*, 68 Yale L.J. 293, 301, n. 39; Weihofen, *Mental Disorder As A Criminal Defense*, 376, n. 1 (1954).

restoration to sanity than would be appropriate in a noncriminal case." It is not unreasonable to place upon a person confined in a mental institution pursuant to an acquittal by reason of insanity a strong burden of proof on that issue." Such an individual has committed a harmful act proscribed by law, and may repeat it or like acts. If, in the opinion of the superintendent of the institution to which he is committed, he should not be at large for reasons of public safety or safety to himself, and if he fails, in a judicial hearing, to dispel a rational doubt that he has recovered his sanity and will not be dangerous, he should not be entitled to discharge.

The fact that the burden of proof may be less favorable to petitioner in the District of Columbia than in some other jurisdiction is not dispositive of the issue of due process. In 1951, the State of Oregon was the only jurisdiction in which the accused, on a plea of insanity, was required to establish that defense beyond a reasonable doubt. Twenty other states, however, placed the burden upon the accused to establish his insanity by a preponderance of the evidence or by a similar measure of persuasion. This Court rejected the contention that the Oregon statute contravened the due process clause of the Fourteenth Amendment. *Leland v. State of Oregon*, 343 U.S. 791. The Court concluded (*id.* at 798) that there was "no practical difference of such magnitude as to be significant in

¹¹ See *People v. Dubina*, 311 Mich. 482, 18 N.W. 2d 902, 908; *Weihofen and Overholser, Commitment Of The Mentally III*, 24 Tex. L. Rev. 307, 329, n. 68.

¹² See *Barry v. White*, 64 F. 2d 707 (C.A. D.C.), *Weihofen, Mental Disorder as a Criminal Defense* 382 (1954).

determining the constitutional question Oregon merely requires a heavier burden of proof." Quoting from *Snyder v. Massachusetts*, 291 U.S. 97, 105, (~~291 U.S. 97~~), the Court held (343 U.S. at 799) that Oregon's procedure did "not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." In so holding, the Court stressed its reluctance to interfere with Oregon's policy since it could not "say that policy violates generally accepted concepts of basic standards of justice."

The defendant in *Leland v. State of Oregon* was tried for murder in the first degree and was sentenced to death. A judgment affirming the conviction was affirmed by this Court even though the State had imposed upon the defendant the burden of proving beyond a reasonable doubt the absence of one of the essential elements of murder, i.e., that the defendant had a mind capable of committing that offense. The issue here, on the other hand, is not the burden of proof with respect to an element of murder or any other criminal offense, but the procedure to be followed to determine eligibility for release from a mental hospital. The result of an adverse determination in this case is neither a sentence of death nor any other form of punishment, but continued treatment. If the Oregon-imposed burden of proof in a first-degree murder trial was consistent with the due process clause of the Fourteenth Amendment, surely the burden of proof announced by the court of appeals for a Section 24-301(g) proceeding is consistent with the due process clause of the Fifth Amendment.

3. *It is not improper to rely on the judgment of the hospital authorities.*—Courts have long been aware that they assume grave responsibility in ordering the discharge of a patient who, in the opinion of the superintendent of the mental institution in which he is confined, should not be at large for reasons of public safety.²¹ The responsibility is increased when the individual seeking release has committed acts forbidden by law and the question is whether, because of an abnormal mental condition which prompted the commission of those acts, he is likely to continue or repeat his conduct. Many state legislatures, like Congress in enacting Section 24-301, have recognized this responsibility by imposing conditions upon the release of such a person which go beyond a mere showing of restoration to sanity. Thus, some states require, in addition, a finding that he will not be dangerous if released, or that there is no danger of a relapse.²² In other states, the court may act only after the hospital authorities have certified that the person confined has recovered.²³

In determining a patient's fitness to be returned to the community, it is entirely proper for the court

²¹ See *Overholser v. De Marcos*, 149 F. 2d 23 (C.A. D.C.), certiorari denied, 325 U.S. 889; *Ex parte Rath*, 143 Wash. 65, 254 Pac. 466; *People ex rel. Romano v. Thayer*, 229 App. Div. 687, 242 N.Y.S. 289, 292; cf. *Ekin v. United States*, 142 U.S. 651, 662. "The story is still told in the District of Columbia of a mental patient who a few days after his release on habeas corpus shot and killed the lawyer who had represented him in the proceeding!" Weihofen and Overholser, *Commitment Of The Mentally Ill*, 24 Tex. L. Rev. 307, 335 (1946).

²² See Weihofen, *Mental Disorder As A Criminal Defense* 376, n. 1 (1964).

²³ *Id.* at 376, n. 4.

to defer to the authorities of the hospital in which the patient is under daily supervision and to whom his history and mental condition are most familiar. These authorities "would appear to be best qualified to exercise the major responsibility for discharging patients."⁴⁴ Confronted with problems of space, the authorities in our public institutions are hardly motivated to retain patients who have recovered and are no longer dangerous.⁴⁵ Courts, moreover, are not well-equipped to make medical findings.⁴⁶

⁴⁴ Lindman and McIntyre, *The Mentally Disabled and the Law* 126 (1961). In Lamb, *Commitment and Discharge of Insane Criminals*, 32 N.Y.S. B.A. Rep. 59, 66 (1909), it is related that the court discharged 34 of 41 mental patients notwithstanding medical advice to the contrary; 14 were reincarcerated, either in prisons or mental hospitals. See Comment, *Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need For Balanced Administration*, 68 Yale L.J. 293, 305, n. 56.

⁴⁵ See *Ex parte Rath*, *supra*, n. 61; Weihofen and Overholser, *Commitment Of The Mentally Ill*, 24 Tex. L. Rev. 307, 333 (1946). See also Lindman and McIntyre, *supra*, at 127. Of course, as the court of appeals held in *Overholser v. De Marcos*, 149 F. 2d 23 (C.A.D.C.), certiorari denied, 325 U.S. 889, "an inmate of St Elizabeths Hospital petitioning for habeas corpus might demand the expert testimony of members of the Commission on Mental Health, or that the court on its own motion might require it. This gives any inmate of St. Elizabeths the protection of a diagnosis by independent experts." 149 F. 2d at 25. See also *De Marcos v. Overholser*, 137 F. 2d 698 (C.A. D.C.), certiorari denied, 320 U.S. 785. In *Curry v. Overholser*, 287 F. 2d 137 (C.A.D.C.), the court of appeals said: "We think this relief is available to all indigent inmates of the hospital, including those committed under section 24-301," 287 F. 2d at 140, and that "[n]on-indigent inmates, if good cause is shown, should also be entitled to relief under *De Marcos*." *Ibid.*, n. 4.

⁴⁶ See *Overholser v. De Marcos*, 149 F. 2d 23, 24 (C.A.D.C.), certiorari denied, 325 U.S. 889; Comment, *Releasing Criminal*

On the other hand, it would not be possible to dispense with a judicial proceeding to determine eligibility for release without raising constitutional questions. Reconciliation of the opportunity for a judicial hearing with (1) deference to the institutional authorities, (2) the vital public interest in securing freedom from acts forbidden by law, and (3) a decent regard for the patient's own protection, is the problem which Congress faced in enacting Section 24-301, and the problem which has faced the court of appeals in interpreting and applying it. The balance struck by Congress and the court of appeals meets the essential requirements of due process.

At issue here is the constitutionality—not the wisdom—of the scheme embodied in Section 24-301. Whether the formal civil commitment standards applicable in some jurisdictions should be used in criminal cases is for the legislative branch to decide. See *Overholser v. O'Beirne*, *supra*, slip. op., p. 4. So long as the Congressional choice meets the minimum standards of due process, it cannot be overthrown by the courts in favor of another system which may seem preferable.

Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration, 68 Yale L.J. 293, 302 (1958); *Nota, Constitutionality of Nonjudicial Confinement*, 3 Stan. L. Rev. 109, 110 (1950).

**THERE WERE NO OTHER CONSTITUTIONAL INFIRMITIES AT
THE TRIAL OR DURING PETITIONER'S CONFINEMENT**

**A. THE CLAIM THAT PETITIONER WAS DEPRIVED OF HIS RIGHT TO
COUNSEL IS WITHOUT MERIT**

The *amicus* (ACLU Br. 58-59), but not petitioner, contends that petitioner was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment because, although counsel was appointed for petitioner before the trial, petitioner "was not afforded the right of representation" prior to that time (ACLU Br. 58).

1. This claim, as the ACLU recognizes, was presented neither in the habeas corpus petition nor in the petition for certiorari. While, under Rule 40(1)(d)(2), the Court may at its option notice a plain error not presented in the petition for certiorari, "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." (*Duignan v. United States*, 274 U.S. 195, 200).^{*} This principle applies with special force where the question is presented for the first time in this Court, and not even by the petitioner. Petitioner was represented by counsel when he filed his petition for a writ of habeas corpus. The Court should not consider claims not made therein.

2. Even if there were a right to appointed counsel in federal misdemeanor cases,^{**} prejudice would have

^{*} See also *Lawn v. United States*, 355 U.S. 339, 362, n. 16; *Husty v. United States*, 282 U.S. 694, 701, 702.

^{**} See Comment, *The Right to Counsel in Misdemeanor Cases*, 48 Calif. L. Rev. 501, 505-506 (1960).

to result from the absence of counsel at arraignment in order to render the proceedings invalid." In the present case no prejudice is shown. The only prejudice suggested by the ACLU (ACLU Br. 59) is that counsel could have objected (1) to the finding in the hospital report as to petitioner's sanity at the time of the crimes, on the basis that this finding went beyond the requirements of the statute governing pre-trial examinations and reports" and (2) to the fact that the report from the D.C. General Hospital was submitted by the Assistant Chief Psychiatrist rather than the Chief Psychiatrist. These objections, however, were both available to counsel at the trial.

In *Canizio v. New York*, 327 U.S. 82, the petitioner, unrepresented by counsel, had entered a guilty plea to a charge of robbery, but had counsel at sentencing.

* *Williams v. Swope*, 186 F. 2d 897, 899 (C.A. 9); *Thompson v. King*, 107 F. 2d 307 (C.A. 8); *Setser v. Welch*, 159 F. 2d 703 (C.A. 4), certiorari denied, 331 U.S. 840; *Hiatt v. Gann*, 170 F. 2d 473 (C.A. 5), certiorari denied, 337 U.S. 920; *Gann v. Pescor*, 164 F. 2d 113 (C.A. 3); *Wilfong v. Johnston*, 156 F. 2d 507, 509 (C.A. 9); *De Maurez v. Swope*, 104 F. 2d 758, 759 (C.A. 9); *In re Reed*, 158 F. 2d 323, 324 (C.A.D.C.); *McJordan v. Huff*, 133 F. 2d 408 (C.A.D.C.); *Alexander v. United States*, 136 F. 2d 783 (C.A.D.C.); *Dorsey v. Gill*, 148 F. 2d 857, 875 (C.A.D.C.), certiorari denied, 325 U.S. 890; *Saylor v. Sanford*, 99 F. 2d 605, 606 (C.A. 5); cf. *Canizio v. New York*, 327 U.S. 82. The flat and unqualified statement that "we take it to be established that in cases arising in federal courts no specific prejudice need be shown where there is a deprivation of the right to counsel" (ACLU Br. 58, 59) is unsupported by authority and is refuted by the authorities we have cited immediately above.

** But see *Winn v. United States*, 270 F. 2d 326 (C.A.D.C.), certiorari denied, 365 U.S. 848; *Calloway v. United States*, 270 F. 2d 334 (C.A.D.C.).

Counsel, however, did not move to withdraw the plea. Mr. Justice Black, speaking for the Court, noted that the court below had been satisfied that "even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally" (327 U.S. at 86), and said (*ibid.*):

We think the record shows that petitioner actually had the benefit of counsel. When that counsel took over petitioner's defense he could have raised the question of a defect in the earlier part of the proceedings [footnote omitted].

The decision in *Canizio*, while based upon the due process clause of the Fourteenth Amendment, was that petitioner *had the benefit of counsel*, and is thus as applicable to federal criminal trials as to state proceedings. *Williams v. Swope, supra*; *Gann v. Pescor, supra*; *Hiatt v. Gann, supra*; *Setser v. Welch, supra*. The *Canizio* decision, involving a defendant who pleaded guilty without representation by counsel, is *a fortiori* applicable where the defendant pleads not guilty.¹¹

B. THE CLAIM THAT PETITIONER DID NOT HAVE ADEQUATE NOTICE
OF THE PROCEEDINGS IS WITHOUT MERIT

1. Petitioner argues that he "had no formal notice that his hearing upon a criminal charge would be transformed into a hearing upon his sanity" (Pet. Br. 24) (see also ACLU Br. 57-58). This claim, too,

¹¹ Compare *Hamilton v. Alabama*, No. 32, O.T. 1961, decided November 13, 1961, a capital case, where, under state law, only at arraignment could the defense of insanity be raised, and could motions to quash, based on systematic exclusion of one race from grand juries or on the ground that the grand jury was otherwise improperly drawn, be made.

was not made in the petition for a writ of habeas corpus and for that reason should not be considered here (see *supra*, p. 75).

2. In any event, the contention has no merit. Petitioner's trial was not "transformed into a hearing upon his sanity." The charges against him, of which he had due notice," were originally, and continued to be at the trial, that he had cashed bad checks. Notwithstanding the suggestion to the contrary in the dissenting opinion below (R. 40), there is nothing in the record to suggest that "the case was turned into an inquiry concerning * * * [petitioner's] sanity at the time the checks were cashed." It is perfectly consistent with the record to conclude—indeed the judgment of acquittal by reason of insanity implies"—that the government introduced evidence to prove that petitioner in fact cashed the bad checks. The question of sanity was thus but one of the questions involved in the case.

Moreover, there is nothing in the record to show that petitioner was surprised, either by the refusal of the trial judge to allow him to substitute pleas of guilty for his previously entered pleas of not guilty, or by the fact that the physician was called to the stand, or by the testimony of the physician. The second hospital report, indicating that petitioner was of unsound mind at the time of the offenses, was a matter of record; the District of Columbia Circuit

" Almost seven weeks elapsed between the date of the filing of the informations (November 6, 1959) and the date of trial (December 29, 1959) (R. 31, 25).

" See *Ragsdale v. Overholser*, 281 F. 2d 943, 948 (C.A. D.C.).

had previously handed down several rulings (see the *Tatum*, *Clark* and *Plummer* cases, discussed *supra*, p. 36, fn. 22) holding that a defense of insanity could not be abandoned by counsel; and there was also precedent in the Municipal Court for the refusal to accept a plea of guilty in the circumstances of the present case (see *Williams v. District of Columbia*, 147 A. 2d 773, 774 (D.C. Mun. Ct. App.)). The record does not show, nor is it alleged here, that petitioner's counsel claimed surprise or requested a continuance. Under the circumstances, the presumption of regularity obtains (see *supra*, p. 23, fn. 7) and petitioner's belated claim of lack of notice is without substance.

C. THE BURDEN OF PROOF AT TRIAL WAS CONSISTENT WITH DUE PROCESS

1. Petitioner urges (Pet. Br. 26) that he was denied due process of law in that he "was in practical effect under the burden of disproving insanity beyond all reasonable doubt—if he were to prevail against the Government in this matter." But there is no constitutional barrier to a judgment of not guilty by reason of insanity where the government has raised a reasonable doubt of the defendant's sanity. (It should be noted again that the government is always required to establish beyond a reasonable doubt that the accused committed the acts charged; otherwise a judgment of not guilty must be entered. In the present case, therefore, it must be assumed that the commission by petitioner of acts forbidden by law was proved beyond a reasonable doubt.)

The question of the burden of proof on the issue of insanity is analogous to the question of the con-

stitutionality of the District of Columbia mandatory commitment law, i.e., whether it is consistent with the due process clause of the Fifth Amendment to commit a defendant found not guilty by reason of insanity when the verdict implies only a reasonable doubt of the defendant's sanity. The argument made in defense of the District of Columbia statute similarly refutes petitioner's argument with respect to the burden of proof (see *supra*, pp. ~~51-51~~, 69-71; *Leland v. Oregon, supra*).

2. Moreover, even if the burden of proof necessary to meet the requirements of due process were higher than proof merely raising a reasonable doubt of sanity, the burden would be met here. The record reflects that a single physician testified at the trial, and that his testimony was to the effect that the crimes with which petitioner was charged were the product of mental illness (R. 19). The district court found, and the record does not show otherwise, that no testimony was offered by petitioner with respect to his mental condition at the time of the offenses (R. 19). Thus, on the basis of the record in this case, whatever burden might be postulated as satisfying constitutional requirements was met.

D. PETITIONER WAS NOT ENTITLED UNDER THE FIFTH OR SIXTH AMENDMENTS TO THE APPOINTMENT OF PSYCHIATRISTS AT GOVERNMENT EXPENSE

Petitioner contends (Pet. Br. 25) that he lacked "a meaningful opportunity to test, explain and refute" the testimony of the physician who was called at his trial, urging that such opportunity "mean[s] nothing

52-62

more or less than an opportunity for independent psychiatric scrutiny of the facts and the procurement of private psychiatrists on behalf of the petitioner." Petitioner claims further that "[s]ince * * * [he] was indigent, this opportunity could be accorded to him only if private psychiatrists were made available to him at Government expense" (see also ACLU Br. 56-57).

1. There is nothing in the record to show that petitioner, who was then represented by counsel, ever requested the appointment of private psychiatrists at government expense at his trial (see *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 568). Although the Municipal Court Criminal Rules do not provide for the appointment of private psychiatrists, the issue could and therefore should have been raised at the trial level."

2. Petitioner, moreover, did not make the claim in his petition for a writ of habeas corpus. Nor was the question considered or decided by the court of appeals. The claim should therefore not be considered here (see *supra*, p. 75).

3. The Assistant Chief Psychiatrist of the D.C. General Hospital—an impartial expert and not a partisan of the prosecution—had submitted a pretrial report declaring that in his opinion petitioner was of unsound mind at the time of the offenses, and that the offenses were the products of this mental illness (R.

"Had the issue been presented to the trial court and had the trial court ruled in petitioner's favor, that court, if it felt that it lacked power to appoint psychiatrists at government expense, could have dismissed the informations.

24). The record shows that at the trial a physician "representing" the same hospital testified similarly (R. 19). Thus the situation here is comparable to that in *McGarty v. O'Brien*, 188 F. 2d 151 (C.A. 1), certiorari denied, 341 U.S. 928, where, in accordance with the Massachusetts Briggs Law, the petitioner had been committed, after indictment for murder, to the State Department of Mental Health, to be examined, as the law required, "with a view to determine his mental condition and the existence of any mental disease or defect which would affect his criminal responsibility" (188 F.2d at 152). The report of the examining psychiatrists was unfavorable to a defense of insanity. Petitioner then moved to be allowed to employ psychiatric experts at the expense of the Commonwealth, but the motion was denied. On appeal from the dismissal of a habeas corpus petition, Judge Magruder, speaking for a unanimous court, said (*id.* at 155):

This is not a case where the state has refused to provide an impartial psychiatric examination of the accused with a view to determining his sanity and criminal responsibility. Quite the contrary, in compliance with a mandatory provision of law, the state has, at public expense, provided such examination by two impartial experts, and their joint report has been made available to the defense. The doctors designated by the Department of Mental Health to make the examination are not partisans of the prosecution, though their fee is paid by the state, any more than is assigned counsel for the defense beholden to the prosecution merely

because he is paid by the state. Each is given a purely professional job to do—counsel to represent the defendant to the best of his ability, the designated psychiatrists impartially to examine into and report upon the mental condition of the accused.

Recognizing that the examination and report by the Department of Mental Health did not preclude the introduction of expert witnesses by the defense in contradiction of the conclusions of the report, the court concluded that the state did not have "the constitutional obligation to promote such a battle of experts by supplying defense counsel with funds where-with to hunt around for other experts who may be willing, as witnesses for the defense, to offer the opinion that the accused is criminally insane" (*id.* at 157). The court indicated the consequences of a contrary holding, stating (*ibid.*):

* * * [S]uppose the defense motion had been granted here, and assigned counsel had been authorized to employ two other experts to examine the accused; The two so chosen might, after examination of the defendant, have arrived at the same professional conclusion stated in the report of the psychiatrists designated by the Department of Mental Health. Would the defendant then be entitled to further financial assistance from the state to continue the search, merely because a defendant of ample private wealth would perhaps have been able eventually to find a more favorable psychiatrist somewhere in the United States, or even in Europe? We would think not; examination and report by two

competent and impartial experts supplied at state expense is enough, we think, to satisfy the state's constitutional obligation under the due process clause." * * *

The decision in *McGarty v. O'Brien* was cited with approval by this Court in *United States ex rel. Smith v. Baldi*, 344 U.S. 561, in which the Court rejected the contention that, in order to afford the petitioner "adequate counsel" (*id.* at 568), the trial court was constitutionally required to appoint a psychiatrist to make a pre-trial examination, saying (*ibid.*):

We cannot say that the State has that duty by constitutional mandate. See *McGarty v. O'Brien*, 188 F. 2d 151, 155. As we have shown, the issue of petitioner's sanity was heard by the trial court. Psychiatrists testified. That suffices.

Although the *Baldi* case involved a trial in a state court, this Court's rejection of the contention that the appointment of a psychiatrist was necessary to afford the petitioner "adequate counsel" strongly suggests that a similar claim under the Sixth Amendment should fare no better. Furthermore, it is difficult to see why there should be any difference in this respect between the requirements of the due process clause of the Fourteenth Amendment, held in the *Baldi* and *McGarty* cases not to require the provision of private psychiatrists at government expense, and of the due process clause of the Fifth Amendment. This Court has specifically held, moreover, that in a federal criminal trial the decision to direct witnesses to be

⁷⁷ See also *Commonwealth v. Belenski*, 276 Mass. 35, 176 N.E. 501; *State v. McManus*, 187 La. 9, 174 So. 91.

summoned by the defendant at government expense is within the discretion of the trial court, and not subject to review by this Court. *Goldsby v. United States*, 160 U.S. 70, 73; *United States v. Van Duzee*, 140 U.S. 169, 173; *Crumpton v. United States*, 138 U.S. 361, 364-365."

Certainly, in cases where the defendant has been examined by impartial psychiatrists, this Court's opinion in *Griffin v. Illinois*, 351 U.S. 12, should not be read to require private psychiatric testimony at government expense. The impracticability of such a holding is reflected in the comments of the United States Court of Appeals for the Third Circuit in *United States v. Baldi* (192 F.2d 540, 547):

Here Smith was, at public expense, given two thoroughly competent lawyers. The same argument that would entitle them to psychiatric consultation would entitle them to consultation with ballistic experts, chemists, engineers, biologists, or any type of expert whose help in a particular case might be relevant. We do not think the requirements of due process go so far. * * *

E. PETITIONER'S CONFINEMENT IS NOT UNCONSTITUTIONAL BECAUSE OF CONDITIONS AT ST. ELIZABETH'S HOSPITAL

Petitioner claims finally (Pet. Br. 50-51) that "the forcible commitment of any individual to a mental hospital is constitutionally justifiable only upon the

"See also *Bistram v. United States*, 248 F. 2d 343, 347 (C.A. 8); *United States v. Valdez*, 229 F. 2d 145, 147 (C.A. 2), certiorari denied, 350 U.S. 906; *Austin v. United States*, 19 F. 2d 127, 129 (C.A. 9); *O'Hara v. United States*, 129 Fed. 551 (C.A. 6); Rule 28, F.R. Crim. P.

assumption that that individual will receive needed psychiatric treatment and rehabilitation." Petitioner purports to demonstrate that the conditions in St. Elizabeths Hospital are inadequate for this purpose (Pet. Br. 18-21).

1. The conditions in St. Elizabeths Hospital are hardly a subject for judicial notice. Whether patients at St. Elizabeths receive adequate care and treatment is not a matter of general knowledge. There is no evidence in the record of the present case to support petitioner's contention that the care and treatment provided at that institution are inadequate. Excerpts from newspaper articles (Pet. Br. 20) have not traditionally been accorded the status of proof of the facts related therein." Testimony of a litigant in another case, decided by the court of appeals almost nine years ago (Pet. Br. 21), can hardly be taken as establishing present conditions in St. Elizabeths Hospital.

"Citation to articles concerning St. Elizabeths Hospital can be a double-edged sword. Compare the "Washington Post" account of one of the wards (Pet. Br. 20-21), not shown to be petitioner's ward (Pet. Br. 20-21), with the following description of the initial reactions of a new patient in the ward for the criminally insane of St. Elizabeths: " * * * [H]e expected cells, rifles, side arms, perhaps clubs and blackjacks. Instead he was escorted to his ward by a fellow patient, introduced around and given a tour of the building. He saw patients working in a shop, editing a newspaper * * * even pitching horseshoes; he heard a patient orchestra practicing; he was told there was patient self-government in Howard Hall and almost no attempts to escape." Spingarn, *St. Elizabeths—Pace-setter for Mental Hospitals*, 212 *Harpers* 58 (Jan. 1956), cited in Comments, 15 *Rutgers L. Rev.* 624, 631-632, n. 57. See also "Washington Evening Star," November 22, 1961, p. B-1, col. 4.

Even if, as petitioner requests (Pet. Br. 6), this Court were to take judicial notice of the record of a different proceeding in the district court involving petitioner, the Court would only have before it evidence that petitioner had been placed in a department which housed 1,000 other mental patients under the supervision of two psychiatrists." The Court could not know what ratio of psychiatrists to patients is "adequate" for the care and treatment of petitioner's illness, the extent of the non-psychiatric personnel, or the quality of the facilities.

2. Assuming that St. Elizabeths Hospital, by reason of inadequate staff and facilities, did not provide "adequate" care and treatment, the inadequacy would be a matter for Congress to rectify. As the court of appeals stated in *Overholser v. O'Beirne, supra*, slip op., p. 4: "[That the hospital] * * * may have too few psychiatrists or inadequate facilities or that they may not use the appropriate techniques * * * are the business of the legislative, not the judicial branch of government if the statute is valid."

Even petitioner does not suggest that no care or treatment is provided." The record contains uncontradicted evidence to the contrary (R. 8). In *Foller*

"Such evidence appears not to be in accord with the actual facts. See testimony of Dr. Overholser in Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 87th Cong., 1st Sess., pp. 508-509.

"In *Minnesota ex rel. Pearson v. Probate Court*, 300 U.S. 370, 372, this Court upheld the validity of a Minnesota statute providing for the indefinite incarceration of sexual psychopaths without suggesting that validity of detention under the statute depended upon the availability of treatment.

v. United States, 292 F. 2d 732 (C.A. D.C.), the appellant, who had been acquitted by reason of insanity and committed to St. Elizabeths Hospital, contended that his confinement was unjustified because he was not receiving sufficient treatment. The court of appeals held (*id.* at 734) that "the evidence sufficiently demonstrates that appellant is receiving treatment." As an indication of the results of treatment, the court noted in *Overholser v. O'Beirne*, *supra*, slip op., pp. 3-4, that "[r]oughly $\frac{1}{3}$ of those committed to St. Elizabeths Hospital since 1954 under this statute (D.C. Code 24-301) have been released, including eight who had committed homicide." "

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

BURKE MARSHALL,
Assistant Attorney General.

RICHARD J. MEDALIE,
Assistant to the Solicitor General.

HAROLD H. GREENE,
DAVID RUBIN,
Attorneys.

DICKINSON 1961.

* The court observed that from 1955 to June 30, 1961, 283 persons had been found not guilty by reason of insanity and committed under Section 24-301; 98 had been released either unconditionally or conditionally.

APPENDIX

Section 22-1410 of the D.C. Code (1951) provides:

Making, drawing, or uttering check, draft, or order with intent to defraud—Proof of intent—"Credit" defined.

Any person within the District of Columbia, who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, or order for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order in full upon its presentation, shall be guilty of a misdemeanor and punishable by imprisonment for not more than one year, or be fined not more than \$1,000, or both. As against the maker or drawer thereof the making, drawing, uttering, or delivering by such maker or drawer of a check, draft, or order, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in its possession or control, shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within five days after receiving notice in person, or writing, that such draft or order has not been paid. The word "credit," as used herein, shall be construed to mean arrangement or understanding, express or implied, with the bank or other depository for the payment of such check, draft, or order.

Section 24-301 of the D.C. Code (Supp. VIII, 1960) provides:

Commitment of persons of unsound mind to the District of Columbia General Hospital—Certification to the Court—Acquittal by jury on grounds of insanity—Confinement in a mental institution—Conditions for release after confinement—Conditional release—Expenses—Writ of habeas corpus—Inconsistent provisions of Federal Statutes superseded.

(a) Whenever a person is arrested, indicted, charged by information, or is charged in the juvenile court of the District of Columbia, for or with an offense and, prior to the imposition of sentence or prior to the expiration of any period of probation, it shall appear to the court from the court's own observations, or from prima facie evidence submitted to the court, that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, or such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If, after such examination and observation, the superintendent of the hospital, in the case of a mental hospital, or the chief psychiatrist of the District of Columbia General Hospital, in the case of District of Columbia General Hospital, shall report that in his opinion the accused is of unsound mind or mentally incompetent, such

report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial, the court shall order the accused confined to a hospital for the mentally ill.

(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial.

(c) When any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, that fact shall be set forth by the jury in their verdict.

(d) If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

(e) Where any person has been confined in a hospital for the mentally ill pursuant to sub-

section (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital. Where, in the judgment of the superintendent of such hospital, a person confined under subsection (d) above is not in such condition as to warrant his unconditional release, but is in a condition to be conditionally released upon supervision, and such certificate is filed and served as above provided, such certificate shall be sufficient to authorize the court to order the release of such person under such conditions as the court shall

see fit at the expiration of fifteen days from the time such certificate is filed and served pursuant to this section: *Provided*, That the provisions as to hearing prior to unconditional release shall also apply to conditional releases, and, if, after a hearing and weighing the evidence, the court shall find that the condition of such person warrants his conditional release, the court shall order his release under such conditions as the court shall see fit, or, if the court does not so find, the court shall order such person returned to such hospital.

(f) When an accused person shall be acquitted solely on the ground of insanity and ordered confined in a hospital for the mentally ill, such person and his estate shall be charged with the expense of his support in such hospital.

(g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

(h) The provisions of this section shall supersede in the District of Columbia the provisions of any Federal statutes or parts thereof inconsistent with this section.

Rule 9, Municipal Court for the District of Columbia, Criminal Rules, provides:

Pleas.—A defendant may plead not guilty, guilty or, with the consent of the Court, *nolo contendere*. The Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.

FILED

OCT 27 1961

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH,

v.

WINFRED OVERHOLSER, SUPERINTENDENT, ST.
ELIZABETHS HOSPITAL, WASHINGTON, D.C.

**REPLY BRIEF FOR THE AMERICAN CIVIL
LIBERTIES UNION, AS AMICUS CURIAE**

FRANCIS M. SHEA,
734 Fifteenth Street, N. W.,
Washington, D. C.

LAWRENCE SPEISER,
1612 I Street, N.W.,
Washington, D. C.
Attorneys for Amicus Curiae.

INDEX

SUBJECT INDEX

Reply Brief for Amicus Curiae:

	Page
A. Standards to be Applied to Cases Arising in the District of Columbia	2
B. Construction of Rule 9	4
C. Abuse of Discretion	5
D. Construing the Statute Not to Apply Where the Defendant Does Not Raise the Insanity Defense or Alternatively Where He Attempts to Plead Guilty	7
E. Construing the Statute Not to Apply Where the Crime Charged is a Non-Violent Misdemeanor	9
F. Constitutionality of Subsection 301(d)	11
G. Constitutionality of the Release Standards	16
H. Deprivation of Right to Counsel	21
Conclusion	24

TABLE OF AUTHORITIES CITED

Cases:

<i>Bratty v. Attorney General for Northern Ireland</i> , 3 Wkly. L.R. [1961] 965	7 n. 4
<i>Ex parte Brown</i> , 39 Wash. 160, 81 Pac. 552	12 n. 8
<i>Bute v. Illinois</i> , 333 U.S. 640	21 n. 16
<i>Canizio v. New York</i> , 327 U.S. 82	22
<i>Ex parte Clark</i> , 86 Kan. 539, 121 Pac. 492	12
<i>Davis v. United States</i> , 160 U.S. 469	6
<i>Ekiu v. United States</i> , 142 U.S. 651	13
<i>Evans v. Rives</i> , 126 F.2d 633	21, 22
<i>Fisher v. United States</i> , 328 U.S. 463	2
<i>Foster v. Illinois</i> , 332 U.S. 134	21 n. 16
<i>Glasser v. United States</i> , 315 U.S. 60	22
<i>Griffin v. United States</i> , 336 U.S. 704	2
<i>Hamilton v. Alabama</i> , No. 32, O.T. 1961	22

	Page
<i>Heflin v. United States</i> , 358 U.S. 415	9
<i>Hirabayashi v. United States</i> , 320 U.S. 81	14
<i>Ex parte Hodges</i> , 314 S.W. 2d 581	6
<i>Leland v. Oregon</i> , 343 U.S. 790	19
<i>Liverpool, N.Y. & P.S.S. Co. v. Commissioners</i> , 113 U.S. 33	19
<i>Mackey v. Mendoza-Martinez</i> , 362 U.S. 384	9
<i>Michener v. Johnston</i> , 141 F.2d 171	22
<i>Overholser v. Russell</i> , 382 F.2d 195	9
<i>People ex rel. Peabody v. Baker</i> , 59 Misc. 359, 110 N.Y. Supp. 848	12 n. 8
<i>People ex rel. Peabody v. Chanler</i> , 133 App. Div. 159, 117 N.Y. Supp. 322, <i>aff'd</i> , 196 N.Y. 525, 89 N.E. 1109	12 n. 8
<i>Ragsdale v. Overholser</i> , 281 F.2d 943	8 n. 6, 15
<i>Regina v. Kemp</i> , [1957] 1 Q.B. 399	7 n. 4
<i>Rex v. Oliver</i> , 6 Cr. App. 19	6, 7
<i>Robinson v. Johnston</i> , 50 F. Supp. 774	22
<i>Ex parte Slayback</i> , 209 Cal. 480, 288 Pac. 769	12 n. 8
<i>State v. Burris</i> , 169 La. 520, 125 So. 580	
<i>State v. Saffron</i> , 146 Wash. 202, 262 Pac. 970	12 n. 8
<i>Stewart v. United States</i> , 366 U.S. 1	2
<i>Tomlinson v. United States</i> , 93 F.2d 652	4, 5
<i>United States v. Bysozoski</i> , 144 F. Supp. 806	4
<i>United States v. Durham Lumber Co.</i> , 363 U.S. 522	3
<i>United States v. Echols</i> , 253 Fed. 862	4
<i>United States v. Naples</i> , 192 F. Supp. 23	8 n. 6
<i>United States v. Raines</i> , 362 U.S. 17	18, 19
<i>United States v. Trinder</i> , 1 F. Supp. 659	4
<i>Yakus v. United States</i> , 321 U.S. 414	14 n. 10

Statutes:

D. C. Code (Supp. VIII, 1960):

Sec. 24-301(b)	11
Sec. 24-301(d)	10, 11
Sec. 24-301(e)	10

INDEX

iii

	Page
Hawaii Rev. Laws, 1955, § 258-38	13 n. 9
Tex. Acts 1937, 45th Leg., p. 1172, ch. 466	5 n. 3
Tex. Code Crim. Proc. Ann., art. 932b, § 1 (Supp. 1958)	5 n. 3

Miscellaneous:

Comment, <i>Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration</i> , 68 Yale L.J. 293 (1958)	13
---	----

Federal Rules of Criminal Procedure:

Rule 11	4
Rule 32(d)	5

Halleck, <i>The Insanity Defense in the District of Columbia—A Legal Lorelei</i> , 49 Geo. L.J. 294 (1960)	8 n. 5
Krash, <i>The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia</i> , 70 Yale L.J. 867 (1961)	20 n. 15, 23

Municipal Court Criminal Rules:

Rule 9	4, 23
Rule 20(d)	23

Overholser, <i>The Present Status of Release of Patients from Mental Hospitals</i> , 29 Psychiatric Quarterly 372 (1955)	20 n. 15
--	----------

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH,

v.

WINFRED OVERHOLSER, SUPERINTENDENT, ST.
ELIZABETHS HOSPITAL, WASHINGTON, D.C.

**REPLY BRIEF FOR THE AMERICAN CIVIL
LIBERTIES UNION, AS AMICUS CURIAE**

The American Civil Liberties Union, whose interest as amicus curiae is stated in our initial brief, is filing this Reply Brief pursuant to Rule 42 with the written consent of both petitioner and respondent. Although we believe that the central problems in this case are adequately discussed in the principal briefs, the Government's brief contains certain arguments that, while for the most part peripheral, require comment. We will consider these arguments in the order in which they are presented in the Government's brief.

A. Standards to be Applied to Cases Arising in the District of Columbia

We would like to make it clear that, while we agree with the Government that in some respects this case involves problems of considerable complexity, we do not believe that these problems can be disposed of by application of the sort of "plain error" rule that the Government appears to believe is applicable to cases—or at least insanity cases—arising in the District of Columbia. (Govt. Br. pp. 21-23) Neither *Fisher v. United States*, 328 U.S. 463 (1946), *Griffin v. United States*, 336 U.S. 704 (1949), nor any other decision of this Court establishes such a rule. *Fisher* did not turn upon constitutional claims or even issues of statutory construction. Rather, petitioner asked this Court to require the District of Columbia courts to depart from the common law and give partial responsibility instructions in criminal cases. To this the Court replied, "The administration of criminal law in matters not affected by constitutional limitations or a general federal law is a matter peculiarly of local concern." *Id.*, at 476. Similarly, *Griffin* involved only a question of admissibility of evidence as to which the Court of Appeals had not spoken. In remanding the case for further consideration, this Court stated, "[T]he Court of Appeals for the District of Columbia ought not to be denied opportunity to formulate rules of evidence appropriate for the District, so long as the rules chosen do not offend statutory or constitutional limitations." *Id.*, at 714. Plainly, these cases do not stand for the proposition that this Court should adopt an attitude of unique deference to the Court of Appeals where the question is whether the decision below does "offend statutory or constitutional limitations." Indeed, if anything, the inference is quite the contrary. Compare *Stewart v. United States*, 366 U.S. 1 (1961), where this Court reversed a criminal conviction in

the District of Columbia on the ground that a question by the prosecutor that concededly impinged upon petitioner's Fifth Amendment rights was prejudicial. And see the cases listed by Mr. Justice Murphy in his dissent in *Fisher* in which this Court has reviewed other issues arising in the District of Columbia. 328 U.S., at 490-491.

Of course, this Court always reviews Congressional legislation "with great restraint" (Govt. Br. 23) where it is challenged as unconstitutional. And under well established principles of constitutional law no objection can be made simply because Congress enacts a statute for the District of Columbia that is different from federal legislation affecting other jurisdictions, since District of Columbia problems may well be different. But this does not mean that the Court will or should refrain from applying its traditional standards in dealing with other constitutional objections to such statutes or from using ordinary principles of construction in interpreting them.

So far as the District of Columbia courts are concerned, there are, to be sure, certain types of local law issues as to which they may have special competence, just as other Courts of Appeals may be thought to be in an advantageous position in construing certain questions of state law. See, e.g., *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960). As we have indicated, we believe that many Durham Rule issues normally fall in this category. But this case does not raise issues concerning the scope or application of the Durham Rule, and we fail to see why the Court of Appeals should be thought to be in a better position than this Court to deal with any of the questions presented here. Nor does the Government advance any specific reasons supporting its generalized plea for deference.

In short, we do not believe that the District of Columbia is some sort of enclave in which the Government can take

action affecting the liberty of citizens with greater license because this Court in scrutinizing that action will close one eye out of "deference" to Congress or the District of Columbia courts.

B. Construction of Rule 9

As we have indicated in our principal amicus brief (hereinafter cited as "Br."), we believe it unnecessary for this Court to reach the question whether under Rule 9 of the Municipal Court Criminal Rules the trial judge had any discretion to refuse a guilty plea competently tendered, because we believe that in any event the judge abused any discretion he might arguably have had. (Br. p. 45) The approach we suggest seems to us advisable because it would avoid a construction of the Rule that might have unforeseen ramifications.

Nonetheless, we believe it desirable to comment briefly upon the Government's argument with respect to the construction issue. (Govt. Br. pp. 24-31) The inferences the Government draws from the course of revision of Rule 11 are nothing more than possible; and the Government's reliance upon the Advisory Committee's citation of *United States v. Trinder*, 1 F. Supp. 659 (D. Mont. 1932), is misplaced, for there is no indication that the defendants in *Trinder*—who were minors, Indian wards of the Government, and apparently unrepresented—objected to the court's action in dismissing the prosecution. The same is true of *United States v. Echols*, 253 Fed. 862 (S.D. Tex. 1918) (where again there is no notation of appearance by counsel for the defendant). And in *United States v. Bysozski*, 144 F. Supp. 806 (D. N.J. 1956), the court held that the indictment did not charge an offense under the proper statute, but indicated that if a new indictment were brought the defendant could renew his guilty plea. Finally, the only other federal case cited by the Government, *Tomlinson*

v. United States, 93 F.2d 652 (D.C. Cir. 1937), is plainly not in point, since it dealt with an attempt to change a plea from not guilty to guilty, a matter which is, of course, entrusted to the court's discretion.¹ See Rule 32(d), F. R. Crim. P.

C. Abuse of Discretion

With respect to the question whether the trial judge abused his discretion in refusing to accept the guilty plea (assuming *arguendo* that he had such discretion), we wish to comment only upon the Government's reliance upon certain authorities.²

The cases cited in our prior brief in which courts have ruled that only the defendant may raise an insanity defense are particularly relevant, as we pointed out, because they were rendered in jurisdictions that have mandatory commitment statutes. (Br. pp. 48-50) In contrast, the Texas decisions relied upon by the Government (Govt. Br. pp. 29-30) were rendered in a jurisdiction in which, so far as we have been able to discover, there was at the time no provision at all for commitment after acquittal on grounds of insanity, much less for mandatory commitment.³ Where

¹ While we considered it advisable to point out the irrelevance of *Tomlinson*, we do not believe that the Government's use of the case suggests it is relying upon it. (Govt. Br. pp. 30-31) It hardly could, in view of its concession that petitioner's initial pleas of not guilty in the case at bar should be disregarded "because they were apparently entered when petitioner was without a lawyer and, although he waived counsel . . . there is serious doubt that he was competent at the time." (Govt. Br. pp. 23-24)

² While the Government does not cite these authorities in connection with this issue, we believe they are relevant since they deal with the defendant's right to control the introduction of the insanity defense, and this in turn has a direct bearing upon the trial judge's decision to accept or reject the guilty plea.

³ Under the statute in effect today, there is no commitment unless the jury finds that the defendant is "insane at the time of trial." Tex. Code Crim. Proc. Ann., art. 932b, § 1 (Supp. 1958). The predecessor statute, which was the same in this respect, dated only from 1937. Acts 1937, 45th Leg., p. 1172, ch. 466.

the defendant's interests are vitally affected, the Texas courts have taken quite a different attitude. In *Ex parte Hodges*, 314 S.W. 2d 581 (Tex. Cr. App. 1958), under a newly established procedure, the state had secured from the court, over the defendant's objection, a pre-trial determination with respect to sanity. The jury found him sane at the time of the offense but insane at the time of the hearing, and consequently the trial was postponed. The appellate court held that conducting this hearing over the defendant's objection, entered by advice of counsel, deprived him of the right to a speedy trial and the right to assistance of counsel.

The Government also contends that *Davis v. United States*, 160 U.S. 469 (1895), stands for the rule that the insanity defense may be raised by the prosecution or the court against the wishes of the defendant. (Govt. Br. pp. 36-37) Entirely apart from the consideration that the appellant in *Davis* was not subject to a mandatory commitment law, the fact is that *Davis* simply does not stand for the rule advanced by the Government. In *Davis* the defendant had raised the insanity defense and had relied upon it heavily, and the issue decided by this Court was simply whether the trial judge had correctly instructed the jury with respect to that defense. The entire opinion was written within those terms of reference, and we are convinced that not even by the most prodigious straining can *Davis* be read to support the Government's position. And if the "rule prevailing in the federal courts" is that "insanity . . . can be raised by either the court or the prosecution" (Govt. Br. p. 36), we can say only that *Davis* does not establish the rule, the Government cites no other cases in which it has been applied, and we know of none outside the District of Columbia.

In this connection, it is noteworthy that the Government distinguishes *Rex v. Oliver*, 6 Cr. App. 19 (1910), on the ground that the language from that case cited in our brief

"was uttered in a case in which insanity had been raised as a defense by the defendant. . . ." (Govt. Br. p. 38) For some reason the Government apparently thinks that consideration not important with respect to *Davis*. Moreover, as a reading of these two cases will disclose, the language from *Oliver* is unequivocally addressed to the issue here involved, whereas the *Davis* opinion does not even purport to deal with that issue.⁴

D. Construing the Statute Not to Apply Where the Defendant Does Not Raise the Insanity Defense or Alternatively Where He Attempts to Plead Guilty

With respect to this issue, we believe it necessary to comment only upon the Government's response to our argument that a literal reading of the statute would not sustain the Government's position because under such a reading an affirmative finding of insanity would be a prerequisite to

⁴ We find unexceptionable, for example, the language quoted by the Government—"whenever the condition of the prisoner's mind is put in issue by such facts proved on either side" (Govt. Br. p. 36)—since all that this means, in the context of a case in which the defendant relied upon the insanity defense, is that he was entitled to take advantage of relevant evidence introduced by the Government.

We are obliged to note that, like the Government, we have not searched the English cases thoroughly. (Govt. Br. p. 30 n. 13) We assume, however, that the Royal Commission did. Still, we must call to the Court's attention a very recent case in which one justice, in dicta, indicated that he would not abide by the traditional rule. *Bratty v. Attorney General for Northern Ireland*, 3 Wkly. L.R. [1961] 965, 980. His remark was made, however, in connection with the question whether, if the accused defends on grounds of "automatism" (involuntarism), the prosecution can urge that his evidence relates to insanity and not to failure of the prosecution to prove that the act was voluntary. See *Regina v. Kemp*, [1957] 1 Q.B. 399. The difference is considerable, since in England the burden is on the defendant to establish insanity. See *Bratty v. Attorney General for Northern Ireland*, *supra*, at 981. This factor, it may also be noted, makes the English general rule particularly strong support for petitioner, since where the defendant must prove insanity there is a more substantial factual basis for commitment after acquittal on grounds of insanity than there is in the District of Columbia.

commitment. (Br. pp. 51-52) While it is not clear to us whether the Government denies that a literal reading would lead to this result, the Government does, at any rate, assert that Congress was "well aware of existing practice in the District of Columbia" (that a reasonable doubt as to sanity sufficed for acquittal) and consequently "used the words 'acquitted solely on the ground that he was insane' to mean 'found not guilty by reason of insanity,' which of course means not guilty because there was a reasonable doubt as to the accused's sanity." (Govt. Br. p. 44 n. 31) We are not advised as to why the Government is so confident about the nature of Congress' information,⁵ nor why, whatever that information was, it is clear that Congress intended language that seems to say one thing to mean something else. At any rate, the Government's argument hardly counters ours, which was simply that the question could not be settled on the basis of a literal reading of the statute.⁶

⁵ See Halleck, *The Insanity Defense in the District of Columbia—A Legal Lorelei*, 49 Geo. L.J. 294, 307 (1960) (The language used in the Committee Report indicates that Congress was laboring under the presumption that "a verdict of 'not guilty by reason of insanity' in the District of Columbia in 1955 represented an affirmative finding by the jury that the defendant was in fact insane.")

⁶ The Government also asserts that the literal construction we describe would produce an "absurd" result. (Govt. Br. p. 44 n. 31) Given the strength of the adjective, we are not sure what it is that the Government means, since a number of states have commitment procedures that depend upon a finding of insanity at the time of commitment, as we pointed out in our principal brief. (Br. p. 31 n. 20) Moreover, it is perhaps relevant that, although the Court of Appeals has rejected the construction of the statute we believe to be suggested by a literal reading, *Ragsdale v. Overholser*, 231 F.2d 943, 947 (D.C. Cir. 1960), at least one district judge has expressed a contrary view. See *United States v. Naples*, 192 F. Supp. 23, 40 (D. D.C. 1961).

E. Construing the Statute Not to Apply Where the Crime Charged Is a Non-Violent Misdemeanor

The Government urges first that the Court should not consider whether the commitment statute should be construed not to apply to non-violent misdemeanors because this argument was not made by petitioner in his habeas corpus petition, nor to the Court of Appeals, nor to this Court in the petition for certiorari. (Govt. Br. pp. 44-45) We submit that refusal of the Court to consider the issue would not be appropriate under the circumstances of this case for the following reasons: (1) The issue is one of law and consequently no fact-finding hearing in the District Court was necessary. (2) The District Judge would have been bound by the decision of the issue adversely to petitioner in *Overholser v. Russell*, 283 F.2d 195 (1960). (3) The issue was considered and decided by both majority and minority in the Court of Appeals in this case. (R. 37, 41-44) (4) Consequently, to tell petitioner to begin all over would be to subject him to the futility of relitigating an issue already decided against him in the lower courts—if, indeed, those courts would entertain a successive petition for habeas corpus raising this question and if they would permit an *in forma pauperis* appeal—without in any way benefitting this Court in disposing of the question. This Court has even waived its Rule concerning timeliness of petitions for certiorari in order to avoid this type of “wasteful circuitry.” *Heflin v. United States*, 358 U.S. 415, 418 n. 7. (5) Finally, the suggested construction of the statute would avoid complicated constitutional questions, and under such circumstances the Court has based its disposition of a case upon issues raised by neither party at any time, even in the briefs in this Court. See, e.g., *Mackey v. Mendoza-Martinez*, 362 U.S. 384 (1960).

Next, the Government maintains that at any rate only

subsection 301(d) (the commitment provision) is before the Court, not subsection 301(e) (the release provision), and that the language of the former provides no basis for the suggested construction since the reference to "dangerousness" is found only in the later. (Govt. Br. pp. 46-47) We discuss *infra* pp. 16-19 whether this Court should consider questions relating to subsection 301(e). If we are correct in our view that it should, then, as we have pointed out, this Court could adopt the position of the dissenters below by holding that, whatever might be said about petitioner's initial commitment, there is no basis for retaining him in custody because 301(e) applies only to persons committing a crime different from the petitioner's and the Government has not instituted civil commitment proceedings on the basis of the mental examination made pursuant to the 301(d) commitment. (Br. pp. 53, 55 n. 32)

But even assuming that only the 301(d) commitment is in issue, it is our position, as we have stated, that the same standard of "dangerousness" should apply. We will not repeat our argument, except to state our belief that it is more sensible to read the two subsections as reflecting the same criteria for commitment and release than to read them as embodying disparate standards, since under the latter view persons would be committed who would most probably be able to secure their release but upon whom would be imposed the burden of seeking habeas corpus at some undefined time when the medical examination could be deemed sufficiently complete.⁷

⁷ The Government contends that the statutory language of subsection 301(e) does not imply that a person may be committed only for a dangerous offense because it requires release when "the 'person will not in the reasonable future be dangerous to himself or others' (emphasis added), rather than when the person will no longer be dangerous." (Govt. Br. p. 47) This assumes that in some way the acquittal on grounds of insanity could amount to a finding that the defendant was in fact dangerous. Of course it could not.

F. *Constitutionality of Subsection 301(d)*

This question is fully discussed in our brief and hence we will restrict ourselves to commenting upon a few specific points made by the Government.

1. With respect to the Government's discussion of the basis for a subsection 301(d) commitment, we would like to make only two observations. First, the Government errs—no doubt inadvertently—in stating that the individual who is committed after an acquittal “is an ‘*accused*’ person confined to a hospital for the mentally ill.” (Govt. Br. p. 49) (Emphasis added.) This category of persons—those not yet tried—is dealt with in subsection 301(b), and naturally their commitment involves questions of an entirely different order than those raised in the case at bar. Second, the Government does not indicate what basis it has for asserting that “the individual involved . . . may very well continue his harmful conduct unless treated.” (Govt. Br. p. 52) There is no finding to that effect and there is no record of the trial testimony—even assuming contrary to fact that this testimony would be relevant in a case like this where the commitment was based upon the command of the statute rather than the discretion of the trial judge; and, as the Government concedes elsewhere (Govt. Br. p. 55), all that can be inferred from an acquittal on grounds of insanity is that there was a reasonable doubt as to whether the defendant had a mental disease or defect that caused the criminal act. The Government appears to have lapsed into the same error with respect to the factual basis for a subsection 301(d) commitment that is contained in the Committee Reports. (See Br. p. 27 n. 18)

2. So far as decisions in other jurisdictions are concerned, we adhere to the summary in our principal brief. As we there state, we have discovered only one case outside the District of Columbia squarely upholding a mandatory com-

mitment law, *Ex parte Clark*, 86 Kan. 539, 121 Pac. 492; and in the jurisdiction concerned, Kansas, the release procedures are apparently much more liberal than in the District of Columbia. (See Br. p. 31 n. 20) The other cases cited by the Government (except *State v. Burris*, 169 La. 520, 125 So. 580, which arguably falls in the *Clark* category) are either Kansas cases or involve discretionary commitment statutes that require a determination as to present mental condition as a basis for commitment.* (Govt. Br. pp. 54 n. 38, 55 n. 42)

* Nor is this the only factor distinguishing these cases, as the following brief description of some of them indicates:

Under the statutory procedure involved in *People ex rel. Peabody v. Chanler*, 133 App. Div. 159, 117 N.Y. Supp. 322, *aff'd*, 196 N.Y. 525, 89 N.E. 1109, commitment was ordered only if the court "deem[ed] . . . discharge dangerous to the public peace or safety." The court was to base this conclusion "upon the evidence given at the trial and the appearance of the defendant thereat." 133 App. Div., at 161. In its discussion of these procedures as applied to the appellant, the court said: "The plea of insanity is that of a defendant. . . . It cannot then be said that a defendant who makes a plea of insanity and seeks to establish it did not have notice under this provision of a hearing that might reveal his condition of insanity at the time of his trial. . . ." *Id.*, at 162.

In *People ex rel. Peabody v. Baker*, 59 Misc. 359, 110 N.Y. Supp. 848, the same statute was involved, and the court pointed out that the defendant had the right to introduce during the trial evidence of his present sanity.

The statute that was attacked in *Ex parte Slayback*, 209 Cal. 480, 288 Pac. 760, did not provide for commitment except by regular civil procedures if "it shall appear to the court that the defendant has fully recovered his sanity." Moreover, the statute applied "Where a person pleads not guilty by reason of insanity."

In *Ex parte Brown*, 39 Wash. 160, 81 Pac. 552, the statute that was upheld did not provide for commitment unless the court deemed discharge to be "manifestly dangerous to the peace and safety of the community." The court observed that the defendant "was tried before a jury, to whom he himself submitted the issue that he was insane when the crime was committed." 81 Pac., at 553.

State v. Saffron, 146 Wash. 202, 262 Pac. 970, involved a statute under which the jury was required to find whether mental illness existed at the time of the verdict; whether, if it did not, there was likelihood of a relapse; and whether the defendant "was a safe person to be at large." These issues were to be litigated during the trial on the criminal charge.

3. While we have no way of knowing whether "criminal defendants who are acquitted on grounds of insanity are nearly always committed to mental institutions" (Govt. Br. p. 53), we would like to point out that the only authority cited by the Government is a statement in a Comment (*Releasing Criminal Defendants Acquitted and Committed Because of Insanity: The Need for Balanced Administration*, 68 Yale L.J. 293 (1958)), which in turn appears to rely solely upon the fact that practically all jurisdictions in this country have some sort of statutory commitment procedure. Since only in eleven states do these procedures provide for mandatory commitment (Br. p. 31 n. 20), the basis for the assertion in question appears most dubious.⁹

4. The Government appears to argue that, assuming *arguendo* the commitment under 301(d) is constitutionally infirm, nonetheless the existence of the release provisions of 301(e) preclude relief here because the petitioner "is not to be discharged for defects in the original arrest or commitment," citing *Ekiu v. United States*, 142 U.S. 651 (1892). (Govt. Br. p. 54) Wholly apart from the invalidity of the release provisions (a matter we discuss *infra*), the *Ekiu* principle cannot be applied in this case. Where the Government, by the time of the habeas corpus proceeding, establishes its right to custody of the applicant (as it did in *Ekiu* by having the appropriate official make the necessary findings under the alien exclusion statute), relief must of course be denied. But in this case the Government established no right to custody aside from the mandate of the commitment statute; and surely the *Ekiu* principle cannot

The court held that this procedure did not deprive the appellant of any of his constitutional rights "because appellant himself raised the issues. . . ." 262 Pac., at 972.

⁹ In our summary of state legislation in our initial brief, we inadvertently neglected to include Hawaii among the mandatory commitment states. See Hawaii Rev. Laws, 1955, § 258-38.

be construed to impose upon the applicant, once he has demonstrated the invalidity of the commitment, the duty to prove that the Government could not establish such a right. To put the matter baldly, the Government, if we read its argument correctly, is asking this Court to hold that, though persons may regularly be committed to St. Elizabeths under an invalid statute, nonetheless they cannot secure their release unless they affirmatively demonstrate at a subsequent time that they qualify for release under the standards established in other sections of the statute. The implications of such a holding in other areas of the law are obvious, and we are convinced that no authority can be cited in support of the argument.

5. It is somewhat different to argue, as the Government apparently also does (Govt. Br. pp. 54-55), that the "public interest" demands that the "preliminary action" of commitment "not meet any formal requirements." But the only case cited by the Government involving personal liberty that seems to us plainly to apply this principle is *Hirabayashi v. United States*, 320 U.S. 81 (1943);¹⁰ and it takes no extended argument to demonstrate that the question whether under the war power a curfew could be imposed on persons of Japanese ancestry in a critical area during a period of extreme national emergency is wholly different from the question presented in the case at bar. The burden of our argument, of course, is that the commitment procedure in question here is wholly unjustified. In other words, we do not quarrel with the principle of *Hirabayashi*, but say only that the extension of that principle in time of peace to a deprivation of liberty of the magnitude of confinement in an insane asylum would be entirely unwarranted and extremely dangerous.

¹⁰ In *Yakus v. United States*, 321 U.S. 414 (1944), the relevant issue was whether a statute denying interlocutory relief pending determination of the validity of a price control regulation was constitutional.

6. The Government suggests that the alternative of a post-trial hearing might reasonably be rejected by Congress because "psychiatrists would not have had a reasonable opportunity to subject [the person] to observation and examination and to report their findings," citing *Ragsdale v. Overholser*, 281 F.2d 943 (D.C. Cir. 1960). (Govt. Br. p. 57) In some cases they might, in others they might not. The point is that a hearing would permit the trial judge to determine whether or not there was sufficient basis for a decision. If at least this were required, commitment for further examination where the judge deemed that advisable would not raise problems as serious as those presented in this case. We repeat, the availability of simple and equally efficacious alternatives is relevant to the constitutional issue.

7. The Government contends that commitment on the basis of a reasonable doubt as to sanity at some prior time is appropriate because that is the standard upon which the person has been acquitted. (Govt. Br. p. 56) This seems to us but another way to state the *quid pro quo* argument, which, as we have pointed out, is unavailable to the Government in this case. (Br. pp. 40-41)

8. The Government urges that commitment may be justified upon the basis of an inference, based upon the acquittal, that the defendant "*may* still be mentally ill and therefore *may* repeat his anti-social conduct if not treated;" that this presumption is clearly reasonable; and that petitioner has erroneously assumed the Government must argue that acquittal supports a presumption that the defendant "is in fact mentally ill at the time of the commitment." (Govt. Br. p. 61) While the Government correctly describes the nature of the inference that can be drawn from an acquittal (giving the word "*may*" a very broad meaning and assuming the evidence at the trial does not counter the inference), it fails to come to grips with the real problem. Basically, our view is that it is wholly unreasonable to

ground commitment upon such an inference alone because it is wholly unreasonable to turn such a tenuous inference into an irrebuttable presumption. (Br. pp. 26-27)

9. Finally, the Government says that petitioner's argument "suffers from the fatal assumption that Congress [in this area] is required to duplicate civil commitment proceedings." (Govt. Br. p. 59) As our discussion of possible alternatives evidences, we do not believe a procedure with some characteristics not present in civil proceedings would necessarily be unconstitutional. All that we say is that there is no adequate basis for the existing differences between the statutes.

G. Constitutionality of the Release Standards

The Government argues, first, that the constitutionality of the release standards applied under the statute, as construed by the Court of Appeals, is not properly before this Court. As one reason, the Government maintains that petitioner attacked his detention "solely upon the ground that his *commitment* was invalid." (Govt. Br. p. 63) We believe that the broad-gauged attack of the petition for habeas corpus upon the validity of the section 301 procedures under which petitioner was being held encompassed the claim that the statute's release standards were invalid, at least if they were relied upon by the Government.¹¹ And

¹¹ See, e.g., the following portion of the application:

"... Section 301 ... is unconstitutional on its face and as construed and applied ... in that

"1. Section 301(d), properly construed, applies only to defendants who affirmatively raise the insanity defense.

"2. Section 301 ... fails to provide that a judicial finding must be made ... that a defendant is at the time of the trial ... mentally ill and socially dangerous ... or in the alternative, requiring an immediate report back to the Court with a full hearing within a few days after an automatic commitment for a judicial

the Government did rely upon those standards, for it contended that petitioner had to meet them in order to secure his release. (R. 8, 11) ¹² Thus, it seems to us that from the start the question whether petitioner could constitutionally be required to meet the release standards imposed by the statute has been properly in the case.

In any event, the constitutionality of these provisions is necessarily before this Court for a wholly independent reason, i.e., the Government's concession that the constitutionality of the commitment provision depends in large part upon the existence of a habeas corpus remedy "with constitutionally sufficient standards governing burden of proof." (Govt. Br. p. 63) Surely the Government cannot be permitted to take the position that petitioner's attack upon his commitment must fail because of the existence of constitutionally acceptable release provisions and at the same time block petitioner's attempt to demonstrate the constitutional infirmity of those provisions.

If we understand the Government correctly, its argument is based upon the premise that the release standards are capable of constitutional application in at least some instances, and that consequently it cannot be said that, had petitioner made an appropriate offer of proof with respect to his mental condition, the standards would have been invalidly applied. Under this view, petitioner's argument

finding of present social dangerousness requiring further treatment and deprivation of liberty in a mental institution." (R. 5)

By describing the standard he maintained was constitutionally required—either an initial or at least an ultimate finding in a proceeding in which the Government would have the burden—surely petitioner was contending that the statutory standard was unconstitutional.

¹² Of course, it would have been futile for petitioner to devote much time in the lower courts to an attack upon the release standards, since the Court of Appeals had already rejected that attack in the past. Indeed, the argument on this point in our principal brief is based entirely upon the release provisions as they have been construed by the Court of Appeals.

must be regarded as an attack upon the release standards as they might be applied to others, and this is not permissible under the rule of *United States v. Raines*, 362 U.S. 17 (1960).

Such an argument misses the mark in all respects. Petitioner's argument is that the release standards that have been clearly delineated by the Court of Appeals are wholly invalid on their face and are incapable of constitutionally acceptable application in any case. If he is correct, then plainly he cannot be expected to make an offer of proof, since there are no constitutionally valid statutory standards against which that offer could be measured. Surely the courts below could not have fashioned a new standard for release out of whole cloth, and consequently petitioner could not be required to make an offer of proof measuring up to some standard that he (or a court) might consider valid had Congress enacted it. To put it another way, if the statutory standards governing release, as construed by the Court of Appeals, are invalid, then the commitment procedure is invalid (as the Government implicitly concedes) and there is no warrant for petitioner's continued detention. Thus the Government's concern about the possible inability of petitioner "to satisfy any appropriate standard" is irrelevant (Govt. Br. p. 63); the question is simply whether petitioner can be held in custody when the *only* standard established by Congress, as construed by the lower courts, is constitutionally invalid. In short, petitioner is attacking the constitutionality of the release provisions as they affect him, i.e., as they impose upon him constitutionally unacceptable conditions for the securing of his freedom.¹³

¹³ Our discussion of sociopathic personalities (Br. p. 36) was designed only to assist in understanding the nature of the standards as defined by the Court of Appeals. At no point have we argued that petitioner should secure his release though not a sociopath because "it may be thought to be

Thus this case is entirely different from the two cases cited by the Government—*Raines*, where state officials challenged the constitutionality of a Civil Rights Act provision because it might be unconstitutional if applied to private citizens, and *Liverpool, N.Y. & P.S.S. Co. v. Commissioners*, 113 U.S. 33 (1885), where the Court remanded the case in order to ascertain whether the statute that was attacked was in fact applicable to the parties under the circumstances.

On the merits of the issue, we would like to add only a few remarks to what we have already said. In the first place, in our view *Leland v. Oregon*, 343 U.S. 790 (1952), which involved only questions relating to the latitude a state has in determining the conditions under which criminal responsibility will be fixed upon its citizens, can hardly be regarded as controlling with respect to the questions in the case at bar. All that can be said is that *Leland* establishes that imposition of a "beyond a reasonable doubt" burden of proof upon an individual is not in all circumstances decisive of the constitutional question. With this, of course, we agree. (Br. p. 35). Moreover, it might be added that *Leland* is not as far-reaching as the Government appears to believe even with respect to the issues decided there. It is not true that this Court affirmed the conviction "even though the State had imposed upon the defendant the burden of proving beyond a reasonable doubt the absence of one of the essential elements of murder, i.e., that the defendant had a mind capable of committing that offense." (Govt.

illegal to subject a sociopath to continuing confinement for failure to satisfy the requirements of the release statute." (Govt. Br. p. 64)

It may be noted also that, while we attack the statute "on its face" and "as applied," throughout we are speaking on the standards that affect petitioner directly. The "as applied" discussion is designed to afford a narrower basis for disposition, i.e., the provisions are invalid at least where the individual objected to the raising of the insanity defense and where the crime with which he was charged was a non-violent misdemeanor. (Br. pp. 40-43)

Br. p. 71) Or, at any rate, this reading of state law was explicitly rejected by the majority.¹⁴

Nor are we impressed with the Government's contention that the courts should defer to the St. Elizabeths' authorities because they have the individual "under daily supervision" and because "[c]ourts... are not well-equipped to make medical findings." (Govt. Br. p. 73) To be sure, judges are not experts in the field of psychiatry, any more than they are experts with respect to a great many other problems that come before them. But they are experts in viewing in proper perspective the claims of narrower disciplines, and they are experts in making decisions that may run against the tide of popular opinion but that are demanded by the injunctions of the Constitution that has been entrusted to their care. In so acting, they are protected by the wisdom of the Founding Fathers, who, recognizing the necessity for placing the "Thou Shalt Nots" that safeguard our liberty in the hands of decision-makers possessing full independence, freed the judiciary from the claims of a volatile public opinion through the provisions of Article III of the Constitution. The staff members of St. Elizabeths, on the other hand, not only cannot be expected to share the judiciary's type of expertise, but do not share the judiciary's independence of decision.¹⁵ In our view, a due regard for

¹⁴ "Although a plea of insanity was made, the prosecution was required to prove beyond a reasonable doubt every element of the crime charged, including, in the case of first degree murder, premeditation, deliberation, malice and intent." *Id.*, at 794. See also *id.*, at 795.

¹⁵ See, e.g., Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L.J. 867, 947 n. 214 ("The hospital authorities are conservative about recommending release because of concern over public criticism in the event that the defendant commits another offense. The superintendent of St. Elizabeths Hospital has stated that, 'In the case of persons who have been arrested, particularly if charged with serious offenses, a greater degree of conservatism must be practiced in the matter of release, in consideration of the attitudes of the public.' Overholser, *The Present Status of Release of Patients from Mental Hospitals*, 29 *Psychiatric Quarterly* 372 (1955).")

these considerations compels the conclusion that the release provisions in effect in the District of Columbia depart radically from the allocation of decision-making power that is necessary to insure the preservation of fundamental freedoms.

H. *Deprivation of Right to Counsel*

Although we felt obliged to bring the issue of deprivation of counsel to the Court's attention after we discovered it in the record, we believe, as we have stated, that there are more appropriate grounds for disposing of the case. Nonetheless, we feel compelled to deal at least in summary fashion with the Government's argument on the merits of the issue. (Govt. Br. pp. 75-77)

First, since the Government seems not to urge with determination the contention that the Sixth Amendment right to counsel does not extend to misdemeanor cases, we will content ourselves with the observation that, as the Court of Appeals for the District of Columbia has recognized, there is nothing in the Sixth Amendment or in this Court's opinions to suggest that counsel may be denied a defendant who may be sent to jail for a year on a misdemeanor charge (in the instant case, for two years on consecutive sentences). *Evans v. Rives*, 126 F.2d 633 (1942).¹⁶ We are aware of no decision to the contrary, nor does the Government cite any.¹⁷

¹⁶ See, e.g., *Bute v. Illinois*, 333 U.S. 640, 660 (1948) ("The practice in the federal courts as to the right of the accused to have the assistance of counsel is derived from the Sixth Amendment, which expressly requires that, in all criminal prosecutions in the courts of the United States, the accused shall have the assistance of counsel for his defense."); *Foster v. Illinois*, 332 U.S. 134, 136-137 (1944) ("By virtue of [the Sixth Amendment] . . . counsel must be furnished to an indigent defendant prosecuted in a federal court in every case, whatever the circumstances.").

¹⁷ None are cited in the secondary source referred to by the Government. (Govt. Br. p. 75 n. 68)

Next, we adhere to our position that in federal cases (and in state capital cases) no specific prejudice need be shown if assistance of counsel is not provided. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942). Nor do we understand how the Government can read *Hamilton v. Alabama*, No. 32, O.T. 1961, to the contrary, for there the Court specifically stated that it would "not stop to determine whether prejudice resulted." (Slip Op. p. 3)

This does not mean, of course, that denial of assistance of counsel at any point after an accusation is necessarily a violation of the Sixth Amendment. It must be determined whether denial occurred at an important stage of the proceedings. See *Hamilton v. Alabama*, *supra*. In *Canizio v. New York*, 327 U.S. 82 (1946), and in the other cases cited by the Government, practically all of which involved absence of counsel at arraignment, the proceeding in question was not of sufficient importance to warrant invocation of the general rule. (For a contrary view, see *Evans v. Rives*, 126 F.2d 633, 641 (D.C. Cir. 1942); *Michener v. Johnston*, 141 F.2d 171, 174 (9th Cir. 1944); and *Robinson v. Johnston*, 50 F. Supp. 774, 778 (N.D. Cal. 1943).) Under such circumstances, a showing of specific prejudice is necessary, but not otherwise.

In the case at bar, we believe that failure to furnish counsel occurred at a critical stage of the proceedings. Concededly, counsel could have objected at the trial to the hospital report's containing a finding as to petitioner's sanity at the time of the crimes and to the fact that the report was submitted by the Assistant Chief Psychiatrist. However, it was at the arraignment that the court ordered the mental examination, and consequently it was at that time that counsel would be called upon to object that there

was insufficient warrant for such examination. It was at arraignment that counsel might also have attempted to plead guilty, and the trial judge might have been more amenable to receiving such a plea at that time. (We do not know whether, when petitioner attempted to enter a guilty plea subsequently, the trial judge treated it as an initial plea under Rule 9 or as an attempted withdrawal under Rule 20(d).) And it was at arraignment or immediately thereafter that counsel might have advised petitioner not to cooperate with the examining physician, at least with respect to matters relating to his sanity at the time of the crime. See Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia*, 70 Yale L.J. 867, 911-912 (1961) ("[E]ffective protection of the privilege against self-incrimination may also require that no accused person be examined who is not represented by counsel. Further, the rights of the accused would seem to require that he be advised that he need not cooperate with the government's psychiatrists, at least so long as he does not interpose an insanity plea."). See also *id.*, at 918-921. Under these circumstances, whatever may be the proper view of the significance of arraignment under other circumstances, where action is taken by the trial judge under section 301 at that time it seems clear that this is a stage in the criminal proceeding at which assistance of counsel is required by the Sixth Amendment.

Conclusion

For the foregoing reasons, as well as for the reasons given in our initial brief, it is our view that the judgment of the Court of Appeals for the District of Columbia Circuit should be reversed and that the case should be remanded with directions that respondent be ordered to discharge petitioner from custody forthwith.

Respectfully submitted,

FRANCIS M. SHEA,
734 Fifteenth Street, N. W.,
Washington, D. C.

LAWRENCE SPEISER,
1613 I Street, N.W.,
Washington, D. C.
Attorneys for Amicus Curiae.

LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED

JAN 9 1962

JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH,

Petitioner,

v.

WINFRED OVERHOLSER,

Respondent.

REPLY BRIEF FOR THE PETITIONER

RICHARD ARENS

Counsel for Petitioner

2000 P Street N. W.

Washington, D. C.

Of Counsel:

RUFUS KING

Southern Building

Washington, D. C.

INDEX

SUBJECT INDEX

	Page
REPLY BRIEF FOR PETITIONER	1
Argument	1
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES:

<i>Bratty v. Attorney General for Northern Ireland</i> , 3 Wkly. L. Rev. 965 (1961)	5
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945)	8
<i>Buck v. Bell</i> , 274 U.S. 200 (1927)	8
<i>In re Hendrickson</i> , 12 Wash. 2d 600, 123 P. 2d 322 (1942)	8
<i>Overholser v. O'Beirne</i> , — F. 2d — (D.C. Cir. 1961)	9
<i>Overholser v. Tremblay</i> , No. 16,778 (D.C. Cir. 1961), — F. 2d —	4
<i>Rex v. Oliver</i> , 6 Cr. App. 19	4, 5
<i>Tremblay v. Overholser</i> , D.C. D.C., H.C. 288-61, — F. Supp. —	2
<i>Watwood v. McIndoo</i> , H.C. 243-60 (D.C. D.C. 1960)	4
<i>Wong Wing v. United States</i> , 163 U.S. 228 (1896)	8

MISCELLANEOUS:

Opinion of Procurator Fiscal of Scotland, December 28, 1961	6
ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT	4, 5
WILLIAMS, CRIMINAL LAW: THE GENERAL PART (1961)	5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 159

FREDERICK C. LYNCH,

Petitioner,

v.

WINFRED OVERHOLSER,

Respondent.

REPLY BRIEF FOR THE PETITIONER

I

The proliferation of arguments by respondent and *amicus* obscures the central issue of this case. This issue requires succinct restatement in reply:

May the prosecution, in a system of adversarial justice, prevent a competent defendant from waiving any defense available to him and *compel* him to assert a defense of *its* choosing *to his disadvantage*?

Petitioner's position is aptly summarized in the opinion by Judge Holtzoff in a case substantially indistinguishable from the one at bar:

"The Court is of the opinion that it is a deprivation of a constitutional right to force any defense on a defendant in a criminal case or to compel any defendant in a criminal case to present a particular defense which

he does not desire to advance. This principle of law is accentuated when the successful advancement of the particular defense must end in disaster, because a person who successfully pleads insanity must be committed to a mental institution." *Tremblay v. Overholser*, D.C., D.C., Habeas Corpus Action 288-61, — F. Supp. — (1961).

Nothing in respondent's brief justifies rejection of this view.

II.

The consequences of the extraordinary and unprecedented action by the Municipal Court, set forth in petitioner's principal brief (Br., pp. 16-23, 31-32, 49-50), have been highlighted by recent developments in this Circuit.

The attention of this Court is invited to another shocking example of the transformation of psychiatry into an instrumentality of oppression in the service of the Government under the *Lynch* doctrine of the Court of Appeals. In January of 1961, a "lady of refinement and education" was denied the right to plead guilty to a charge of public intoxication and was forced to submit to an insanity defense. Acquitted by reason of insanity over her objection, upon the basis of testimony that her drinking was the product of an anxiety neurosis, she was forthwith committed to Saint Elizabeth's Hospital for an indefinite period capable of extending for the rest of her natural life. These facts emerged in the course of a *habeas corpus* action in December of 1961. In the words of the District Court in *Tremblay v. Overholser*, Habeas Corpus No. 288-61, D.C. D.C., — F. Supp. — (1961), on December 8, 1961:

"Neither she nor her counsel raised the issue of insanity, neither she nor her counsel introduced any

evidence bearing on the issue of insanity, and no motion or request was made in her behalf for a finding of not guilty on the ground of insanity. However, the presiding Judge, on the basis of the report of the D.C. General Hospital, . . . found the petitioner not guilty on the ground of insanity. The appropriate statute of the District of Columbia makes it mandatory on the Court, when a person is acquitted on a criminal charge on the ground of insanity, to commit such person to St. Elizabeth's Hospital, and accordingly she was forthwith so committed. This took place on January 3, 1961. Petitioner has been an inmate of that hospital ever since, to this date."

Commenting upon these facts, the District Court found that whether or not the petitioner needed hospitalization, she "should not be among insane people," which was precisely where she was confined at Saint Elizabeth's Hospital, as a result of the "benign" working of the insanity defense in Municipal Court.

The District Court concluded:

"... There was a time when insane people were placed in jails, temporarily, at least. We looked upon this as a barbaric custom that has been pretty well eliminated. But we have reverted to it in reverse, we are placing sane people in insane institutions, which I think is even more barbaric. . . ."

Holding that it was a deprivation of a constitutional right to force the insanity defense upon a recalcitrant and competent defendant, the District Court granted the petition for *habeas corpus*, sustained the writ and ordered the petitioner to be released.

Respondent moved for summary reversal of the District Court order and the Court of Appeals, without affording

the petitioner an opportunity of submitting briefs or memoranda in opposition, vacated the District Court order within twenty-four hours of an "emergency" hearing in the Court of Appeals—apparently upon the strength of the *Lynch* doctrine here under scrutiny. See *Overholser v. Tremblay*, No. 16,778 (D.C. Cir. 1961).¹

III.

Respondent's brief confuses the existing state of legal doctrine in England and Scotland vis-a-vis the forcible imposition of the insanity defense.

It can be unequivocally asserted that English law is precisely as expressed by *Rex v. Oliver*, 6 Cr. App. 19, at 20 (1910). (See Br., p. 36.) Moreover, English practice has at no time, at least since 1910, deviated from the norm established by *Rex v. Oliver*, *supra*.

The Royal Commission in its Report on Capital Punishment noted, in commenting upon existing English practice, the oppressive results of any invocation of the insanity defense by anyone other than the defendant. It noted that a defendant who was attempting to set up a defense such as provocation would be seriously and unfairly prejudiced if the prosecution were to be allowed to present evidence as to the defendant's insanity.² See ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, §§ 448, 454 (1953).

¹ The arbitrary and irrational application of criminal commitment law to effect the confinement of a criminal defendant in the mental ward of a public hospital is encountered even in the context of traffic violations in the District of Columbia. See, e.g., *Susie V. Watwood v. Mary McIndoo*, H.C. 243-60 (D.C., D.C. 1960).

² Glanwill Williams cannot be cited as favoring the respondent's position. (See Respondent's Br., p. 39, fn. 25.) Essentially, Glanwill Williams was addressing himself primarily to the situation in which the defense claimed diminished responsibility and in which the Crown was therefore entitled to regard sanity as

In considering possible objections to the practice exemplified by *Rex v. Oliver, supra*, the Royal Commission concluded:

"... [T]here are not sufficient grounds to justify us in recommending such a fundamental change in English judicial procedure. Cases in which an insane prisoner declines to plead insanity, and those in which the defence may be embarrassed by pleading simultaneously both insanity and another defence, are not likely together to amount to more than one or two a year. It is a fundamental principle of criminal jurisprudence that a long established procedure should not be altered unless there are very strong reasons for doing so, and in this matter the proposed remedy would be altogether disproportionate to the mischief it is designed to cure. . . . [I]t would [therefore] not be desirable to give the prosecution power to raise the issue of insanity against the wishes of the defence." *Id.*, §§ 453-454.³

being an issue. Here, too, the context of the discussion appears essentially that of capital crime. It is noteworthy, moreover, that Glanvill Williams insisted that if the prosecution were to be allowed such initiative, the burden of proving insanity, in contrast to the *Lynch* doctrine, had to rest squarely upon the prosecution to the point of adducing "such serious evidence of insanity as . . . [to justify] the use of what is in effect a power of compulsory commitment . . ." WILLIAMS, CRIMINAL LAW: THE GENERAL PART, § 176 (1961). This is a far cry from what is advocated by respondent in the case at bar.

Addressing itself entirely to the subject of capital crime, the Royal Commission did recommend granting the power of invoking the insanity defense to the judge, as distinct from the prosecution. ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT, § 454.

The results of an enforced insanity defense, however, would be far less oppressive under English than American law. English law puts the burden of establishing the insanity defense squarely upon the proponent thereof. *Bratty v. Attorney General for Northern Ireland*, 3 Wkly. L. Rev. 965 (1961).

Scottish law, following the Civil Law tradition, does indeed grant authority to the prosecution as well as the court to present evidence concerning the mental condition of a person charged with crime. Significantly, this authority is invoked primarily in the investigation of mental competency to stand trial.

There is no extant case in Scotland in which an insanity defense has been forced upon a recalcitrant and competent defendant. Asked whether Scottish law permits the forcible imposition of the insanity defense on an accused person, Mr. Robert MacDonald, Procurator Fiscal of Scotland, in a letter addressed to the Secretary of the Law Society of Scotland for transmission to petitioner's counsel, replied as follows on December 28, 1961:

"It would not in my view be proper to assume that our law permits 'the forcible imposition of the insanity defence' on the accused person. The position is rather that the prosecution brings to the Court's notice the fact that the accused is probably unable to instruct his defence on account of his insanity and leaves it to the Court to decide the procedure to be adopted.

"The Court's decision, I am satisfied, is dictated in all cases by what is likely to be of maximum fairness to the accused person."

In a formal *opinion of counsel*, dated December 28, 1961, Mr. Nicholas Fairbairn, advocate in Edinburgh, Scotland, declared as follows:

"It is extremely rare for the Crown to attempt to establish a plea of insanity in bar of trial without the

* Members of the Scottish bar, engaged in criminal practice, consulted by petitioner's counsel in this matter, uniformly rejected the suggestion that Scottish law could be interpreted as supportive of the respondent's position in the case at bar.

concurrence of the defence, and unknown in a summary charge—only in one or two exceptional cases of gravity, and then usually only where the accused is unrepresented. It is unknown for the Crown to attempt to establish insanity at the time of the commission of the offence without a plea of insanity in bar of trial, e.g., if a man went to trial and the Crown or Court accepted that he was fit to plead, *only the Defence could and would attempt to have him found "insane at the time of the commission of the offence."*⁴²

IV.

Respondent asserts that only minimal procedural safeguards are required in proceedings resulting in commitment for care and treatment as distinct from punishment. The suggestion is implicit that attachment of the words "care and treatment" to a given mode of confinement is, without more, determinative of the scope of necessary procedural safeguards.

* The mechanistic interpretation of respondent would permit the transformation of a prison into a hospital by the painting of the legend "hospital" upon the guarded portals of the penitentiary.

This Court has never hesitated to pierce the veil of nomenclature to give clear and realistic assessment to the nature of the deprivation which was in fact as well as in name imposed upon a citizen and to provide for procedural safeguards commensurate with the magnitude of the deprivation.

⁴² This opinion was transmitted to petitioner's counsel. The confusing character of respondent's contentions concerning Scottish law and the dearth of appellate case law on the subject prompted contact with leading members of the Scottish bar for appropriate opinions, of which this is a characteristic sample.

The trend of decision has been clearly one of refusing to regard official nomenclature as controlling. The terms "civil" and "criminal" have thus long lost the magic of compelling any specific procedural results. What determines the scope of procedural protection, instead, is the nature of the deprivation itself, regardless of nomenclature. Conceptions of due process, determinative of procedural fairness, have thus been geared to the specific nature of a given deprivation, irrespective of its name. The trend of decision is easily demonstrable. In 1896 this Court held deportation under the Chinese Exclusion laws to be a civil matter, non-punitive in character, and hence devoid of the necessity of significant procedural safeguards. See *Wong Wing v. United States*, 163 U.S. 228 (1896). In 1945, deportation was viewed in a more advanced and realistic light. The terms "civil" and "non-punitive" in no way blinded this Court to the realization that a deportation proceeding involved a deprivation of uttermost consequence, transcending in significance the imposition of a fine and the infliction of even a long term of imprisonment. As aptly stated by Mr. Justice Douglas in *Bridges v. Wixon*, 326 U.S. 135, 147 (1945), deportation comports a deprivation so severe as to "result in the loss of all that makes life worth living." This Court concluded that the infliction of such a deprivation required safeguards commensurate with its magnitude, i.e., that "[m]eticulous care must be exercised lest the procedure not meet the essential standards of fairness." *Id.*, at 154.⁵

⁵ To call a deprivation "therapeutic" in no way lessens its deprivational effect without more.

Hence, so-called medical measures like sterilization have nonetheless been deemed to require a hearing meeting meticulous standards of due process of law. See, e.g., *In re Hendrickson*, 12 Wash. 2d 600, 123 P. 2d 322 (1942); *Buck v. Bell*, 274 U.S. 200, 206-207 (1927).

The enormity of the deprivation inflicted upon a citizen through commitment to the existing mental hospital system has been adequately set forth before (see Br., pp. 18-23) and requires no restatement."

Conclusion

By reason of the foregoing the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

RICHARD ARENS
Counsel for Petitioner
2000 P Street N. W.
Washington, D. C.

Of Counsel:

RUFUS KING
Southern Building
Washington, D. C.

Dated: January 5, 1962

* It is ironic that after championing the position of the Court of Appeals for the D.C. Circuit as a near legislative chamber, respondent relies on *Overholser v. O'Beirne*, — F. 2d — (D.C. Cir. 1961) (Respondent's Br., p. 49), in which the Court of Appeals declared that the adequacy or inadequacy of treatment facilities at Saint Elizabeth's Hospital was of no concern to it and that such considerations as that the therapeutic facilities at Saint Elizabeth's Hospital might be worse than those of a federal prison were "the business of the legislative, not the judicial branch of government . . ." *Id.*, Slip Sheet Opinion, p. 4.

If this view were sustained by this Court, indefinite imprisonment at Saint Elizabeth's Hospital by judicial fiat may be substituted for a definite term of imprisonment under conventional penal law—significantly without securing to the beneficiary of this revolutionary innovation the elementary treatment facilities which alone could be deemed to justify a departure from conventional practice in reason or fairness.